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IN

THE COURT OF APPEAL,
THE HIGH COURT OF JUSTICE,
THE COURT FOR CROWN CASES RESERVED,
IN IRELAND,

AND

THE IRISH LAND COMMISSION.

EDITED BY

T. HENRY MAXWELL,

ONE OF HIS MAJESTY'S COUNSEL.

1921.

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Lord Chancellors.

The Right Hon. Sir James Henry Mussen Campbell, Bart.

The Right Hon. Sir John Ross, Bart.

Lords Justices of Appeal.

The Right Hon. Stephen Ronan.

The Right Hon. James O'Connor.

Chancery Division.

The Right Hon. Charles A. O'Connor M.R.

The Right Hon. John Blake Powell.

Land Judges.

The Right Hon. Sir John Ross, Bart.

The Hon. William E. Wylie.

Irish Land Commission: Judicial Commissioners.

The Hon. William E. Wylie.

The Hon. Gerald FitzGerald.

Attorneys-General.

The Right Hon. Denis Stanislaus Henry K.C.

The Right Hon. Thomas Watters Brown K.C.

Solicitor-General.

Daniel Martin Wilson K.C.

[These Reports will be cited as follows: —[1921] 1 I. R.]

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Master of the Rolls,	Robert Rice,	Barrister-at-Law.
Mr. Justice Barton,	D. M. Steen. M. G. Ellison,	Barristers-at-Law.
Land Judge and Land Commission,	T. C. Tobias,	Barrister-at-Law.

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CASES

DETERMINED BY

THE CHANCERY DIVISION

OF

THE HIGH COURT OF JUSTICE IN IRELAND,

AND BY

THE IRISH LAND COMMISSION,

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL.

1921.

HUDDLESTON'S ESTATE (No. 2) (1).

Appeal.
1920.
June 7, 8.
Nov. 22.

Land Purchase Acts—Bonus—Mortgagees in possession—Originating application by—Mortgagees becoming absolute owners pending completion of sale—Right to bonus—Crucial date—Irish Land Act, 1903 (3 *Edw.* 7, *c.* 37), *sect.* 48, *sub-s.* 4.

On the 25th October, 1907, mortgagees in possession lodged an originating application under the Land Purchase Act, 1903 (3 Edw. 7, c. 37), seeking to have the lands of which they were in possession declared fit to be regarded as a separate estate, and in the same year executed purchase agreements with the tenants. On the 16th April, 1918, the Land Commission made an order declaring the lands fit to be regarded as a separate estate. In the meantime the mortgagees, under the Statute of Limitations, had become absolute owners. On the 19th June, 1919, the lands were vested in the purchasing tenants, and an order made attaching the claims to the purchase-money.

Held (Sir James Campbell C. dissentiente), that the crucial date for ascertaining the right to the bonus was the date of the agreement for sale.

Per Ronan L.J.: The Act makes the right to the bonus depend on the exercise of the powers of disposition, not on the extent of ownership. The bonus is payable if there is an agreement by a competent vendor and a subsequent vesting order under that agreement.

---

(1) Before Sir James Campbell C., Molony C.J., O'Connor M.R., and Ronan and O'Connor L.JJ.

Appeal.
1920.

HUDDLESTON'S ESTATE.

APPEAL from an order of Wylie J., dated February 3rd, 1920, whereby it was declared that the vendors, Denis Huddleston and Daniel O'Connell, were entitled to the percentage payable under sect. 48 of the Irish Land Act, 1903, in respect of lands in County Cork sold in the matter. The vendors were assignees of the interest of mortgagees under a mortgage made by Daniel Cronin Coltsman on February 6th, 1856. A petition for the sale of the lands was filed in the Land Judge's Court on July 23rd, 1886, and a receiver was then appointed. The petition for sale was dismissed on March 25th, 1901, and the receiver discharged, whereupon the vendors entered into possession as mortgagees, and so continued without having accounted or having been required to account by anyone in respect of the rents or profits.

On October 25th, 1907, the vendors as mortgagees in possession lodged an originating application, asking that the lands in question might be declared fit to be regarded as a separate estate, and in the same year executed purchase agreements with the tenants.

On April 16th, 1918, the Land Commission made an order declaring the lands fit to be regarded as a separate estate.

On June 19th, 1919, the lands were vested in the purchasing tenants, and an order made attaching claims to the purchase-money.

In the meantime the vendors had, through the operation of the Statute of Limitations, become absolute owners. The vendors, as absolute owners, applied on the ruling of the final schedule for the payment to them of the bonus. Wylie J. made the following order:—"The Court, though of opinion that the estate was sold by the vendors as mortgagees in possession within the meaning of the aforementioned section [sect. 48 of the Irish Land Act, 1903], doth declare them entitled to the percentage payable under sect. 48 of the Irish Land Act, 1903, in respect of the estate sold in this matter." Against this order the Treasury appealed on the ground that the estate had been sold by mortgagees in possession, and that therefore no bonus was payable.

Wylie K.C. and *Newett*, for the appellants, the Treasury:—

Appeal.
1920.

Huddleston's Estate.

Our contention is that the bonus is given as an inducement to landlords to sell, and that the vital time for ascertaining the right to the bonus is the date of the agreement for sale. Therefore, if the person selling to the tenants is a mortgagee in possession at the time of the agreements for sale, he is not entitled to the bonus, and the mere fact that the full estate vests in him pending completion, and before the advance of the purchase-money, does not entitle him to the percentage. The vendors here initiated proceedings as mortgagees in possession. Under sect. 42 of the Land Law (Ireland) Act, 1896, a mortgagee in possession, with power of sale, is for all the purposes of the Land Purchase Acts deemed to be a landlord. But for that section, he could not enter into agreements for sale to the tenants. Sect. 48 of the Irish Land Act, 1903, which created the bonus, enacts, in sub-s. 4, that "This section shall not apply . . . to any estate sold by a mortgagee in possession." A mortgagee in possession who proceeds to sell in reality only takes steps to realize his security. It does not follow that because the Statute of Limitations had run in their favour, the mortgagees in this case should for the purpose of the bonus be treated as absolute owners. In *Bandon's Estate* (1), Wylie J. said: "As the bonus is expressly given as an aid to the sale, it appears to me that the time of ascertainment must be the date of sale," and "date of sale" he took to be the date of the agreements. This case was followed in *In re Thomson's Estate* (2). The expression "time of sale" means the time of the agreement for sale: *Lyle's Estate* (3). In *Barton's Estate* (4) it was held that the date of sale was the date to be applied in considering whether an estate was so circumstanced that it would, independently of the Act of 1896, be sold without the consent of the owner as to price, within the meaning of sect. 48, sub-s. 4, of the Irish Land Act, 1903.

(1) [1907] 1 I. R. 226.
(2) [1912] 1 I. R. 460, note 466.
(3) 41 I. L. T. R. 112.
(4) [1909] 1 I. R. 205.

Appeal.
1920.
HUDDLESTON'S ESTATE.

Conner K.C. and *Poole*, for the respondents:—

It was decided in *Bandon's Estate* (1) that the bonus was given for the sale of an estate. There could be no agreement for the sale of an estate until there had been a declaration of an estate by the Land Commission.

[Sir James Campbell C. referred to *In re Boyle's Estate* (2), at p. 289, where FitzGibbon L.J. says: "I must regard sales 'under the Land Purchase Acts' as a genus, one distinct species of which consists of sales 'under this Act' for the purpose and within the meaning of sect. 48, sub-s. 1, of the Act of 1903. That being so, the test whether any particular sale comes within the species, and carries the right to bonus, is whether the lands sold have been declared a separate estate by the Estates Commissioners; that not having been done, I am of opinion that no bonus is payable in respect of the sale in this case."]

The crucial time, according to the contention on the other side, for ascertaining the right to the bonus is the date of the last agreement for the sale of any holding included in the estate. In this case some of the agreements with the tenants were not entered into until 1918. No date of sale can be fixed by reference to the agreements with the tenants, because here these agreements ranged from 1907 to 1918. The date for determining insolvency is the date when the sale becomes unconditional.

Every person proposing to sell land under the Irish Land Act, 1903, comes within the provisions of sect. 17 of that Act; and if for not less than six years immediately preceding the originating application the vendor has been in receipt of the rents and profits, he shall be dealt with as owner of the land for all purposes other than the distribution of the purchase-money or the payment of the bonus. There is a very clear distinction between "sale" and "agreement to sell": see Sale of Goods Act, 1893, sect. 1, sub-ss. 1 and 4. "Sale" has only one meaning, the completion of the agreement to sell.

---

(1) [1907] 1 I. R. 226.

(2) [1909] 1 I. R. 278.

We submit that the date for ascertaining the right to the bonus is the date of the vesting order, or of the allocation of the purchase-money; or, at the earliest, the date on which the lands are declared fit to be regarded as an estate.

Newett, in reply.

Cur. adv. vult.

Nov. 22.

SIR JAMES CAMPBELL C.:—

Denis Alexander Huddleston and Daniel O'Connell lodged an originating application in this case in the prescribed form under the Land Purchase Act, 1903, upon the 25th October, 1907, seeking to have certain lands in the County of Cork, of which they were at that date mortgagees in possession, declared to be fit to be regarded as a separate estate for the purpose of sale under the Act. The proceedings consequent upon this application dragged along for twelve years, but in 1919 the sale of the estate was completed, by their holdings being vested in the tenant purchasers, and the purchase-moneys lodged in bank under sect. 24, with the prescribed order for the attachment of claims. The respondent Huddleston, as the surviving vendor, thereupon claimed to be absolutely entitled to the percentage and the purchase-money upon the ground that the vendors had by the Statute of Limitations acquired the fee-simple in the lands in March, 1915, and their claim was returned in the Final Schedule of Incumbrances filed on the 17th November, 1919. An objection to the schedule in this respect was lodged by the Official Assignee, as representing the mortgagor, and claiming that the service of the originating application suspended the running of the Statute of Limitations as against the mortgagor. The hearing and decision upon this objection by Ross J. will be found in the report, *Huddleston's Estate* (1). Suffice it for the moment to say that he overruled it, holding that the originating application had not the effect contended for, and that the absolute estate in the lands had by the operation of the statute been transferred to the vendors. Subsequently the respondent applied for payment to him of the percentage, but upon this application coming before Wylie J., on the 15th January last, he directed that notice of the application should be served upon the Treasury Solicitor, and adjourned the hearing until the 20th January. Upon that date there was no appearance by or on behalf of the Treasury; but Wylie J. again adjourned the hearing, evidently for the purpose of inducing the Treasury to contest the claim, with the result that their solicitor replied by letter which in effect stated that as the result of the decision by Ross J. upon the claim by the Official Assignee he could see no reason for objecting to the payment of the bonus. I have little doubt that this official before coming to this conclusion had, in accordance with the usual practice, been advised upon the matter by the Law Officers of the Crown; but, be this as it may, he did not appear, nor was any objection to the payment of the bonus made on the 3rd February. I cannot recall any instance in which an order of the High Court was ever couched in the terms in which the order of Wylie J. made upon that date reads. It is as follows: "The Court, though of opinion that the estate was sold by the vendors as mortgagees in possession within the meaning of sect. 48 of the Irish Land Act, 1903, doth declare them entitled to the percentage payable under that section," &c. In the case of a Judge of his learning and experience I can only interpret this remarkable order in one way, and hold that he considered himself bound by the previous decisions of this Court to decide, contrary to his own opinion, in favour of the vendors.

---

(1) [1920] 1 I. R. 29.

The exact question for decision turns upon the meaning of the words "any estate sold," which are to be found in the opening words of the section, and are repeated throughout the section in all its clauses, because, as I shall presently show, it has been decided by this Court, on at least two occasions, that the same construction must be given to these words wherever they occur in the section. Much argument and criticism have been expended upon many sections in the earlier legislation, mainly with the view of establishing that such phrases as the "sale of a holding," "lands sold," &c., are used at one time in the sense of the actual or completed sale, and at another in that of the conditional agreement of purchase between landlord and tenant. I agree in the opinion of Holmes L.J. in *Boyle's Estate* (1) that, as this bonus or percentage is the creation of the Act of 1903, we must, in view of the essential differences between that Act and its predecessors, look to it for guidance as to the meaning and effect of this sect. 48. I must, however, correct an impression which appeared more than once in the argument for the appellant, as it has done elsewhere, that in the prescribed forms of purchase agreements under the earlier Acts, which were confined to the sales of "holdings" as distinguished from "estates," the condition was expressed in the words "subject to an advance of the purchase-money being sanctioned by the Land Commission." In truth, these forms at no time, from the earliest to the latest, are made conditional upon the sanction of the advance, but only upon the advance being made. This erroneous impression has, I am satisfied, been responsible for much of the confusion which has enveloped this question.

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(1) [1909] 1 I. R. 278.

This error owes its origin, in my opinion, to a definition which is to be found in a note on page 397 of Cherry and Wakely's Text-Book, 2nd edition, in which it is stated that the expression "'Lands sold' [under the Act of 1887] mean lands agreed to be sold and for the purchase of which advances have been sanctioned." It is true that this definition of the date when lands were sold under this earlier legislation would be fatal to the conclusion, so strongly pressed before us, that they were sold at the date of the agreement to sell; nevertheless, I am satisfied that they were not sold until a later date, namely, when the condition of the purchase agreement that an advance should be made had been performed by the making of it. I think the learned authors were influenced in this definition by regard to sect. 22 of the Act of 1887, which confers jurisdiction upon the Land Commission, upon the application of either party to the agreement, to decree specific performance of it, provided the advance of the purchase-money has been sanctioned by the Land Commission. This is the only section in the whole Act in which I can find any reference to the sanction of the advance, and in the Act of 1885 it does not occur at all. I think, having regard to the purpose of this sect. 22, that what was contemplated was a definite and absolute sanction; but the form of sanction adopted by the Land Commission, and prescribed by their rules made under the Act, was conditional only, and has remained so from that date to the present. This may to some extent account for the fact that this section has been practically a dead letter, having been only invoked, so far as I can find, on two occasions, both more than thirty years ago; but I think it was fated to prove abortive from the start. I concur in the observations of Wylie J. in *Croker's Estate* (1) in so far as he states that all acts to be performed subsequent to the sanction of the advance were acts to be performed by the Land Commission, and not by the parties to the agreement. I cannot accept his suggestion that these were ministerial acts, and least of all do I agree that the vesting order, or alternative fiat, was a mere matter of course, as he describes it to be. On the contrary, the Legislature plainly regards it as perhaps the most important stage in the entire proceedings. It is the purchaser's conveyance or title-deed, conferring upon him an indefeasible estate, and as such has to be registered under the Registration of Title Acts. It must be certified and examined by the Examiner of Titles, and must be executed by the Judicial Commissioner himself, or by one of his colleagues of the Land Commission, while by sect. 32 of the Act of 1896, repeating but extending analogous provisions in the earlier Acts, they are empowered to make it or the fiat subject to all such conditions, exceptions, and modifications of the purchase agreement as they think necessary. It is by this section that they are empowered to fiat the agreement, in lieu of a vesting order; but it is to be noted that the fiat is not to have the effect of a vesting order unless and until the advance is made.

It was decided, both in *Vaugh* v. *Estates Commissioners* (2) and in *Weir's Estate* (3), that in determining under sect. 98 of the Act of 1903 whether the lands, or any part of them, were fit to be declared an "estate," the Land Commission was acting judicially, and not merely performing a ministerial act; and I am satisfied that this applies with even greater force to their act in making the vesting order, or fiating the agreement. But the performance of all acts subsequent to this conditional sanction of the advance—the charging of the holding with the payment

(1) [1913] 1 I. R. 522.
(2) 44 I. L. T. R. 157.
(3) [1908] 1 I. R. 161, 172.

of the purchase-money, the making of the advance, the vesting order or fiat—is entrusted to the Land Commission alone; and therefore any proceeding in the nature of a suit for specific performance, once the advance is sanctioned, would in effect be an application to the Land Commission to make an order against themselves for the completion of the sale. My object in elaborating this point has been to emphasize the fact, so often overlooked, that even under the Acts antecedent to 1903 there were three parties to the sale of a holding whose consent and co-operation were necessary before the holding could be sold: the landlord-vendor, the tenant-purchaser, and the Land Commission. The late Master of the Rolls, then Mr. Justice Meredith, Judicial Commissioner, said in his judgment in *Sherlock's Estate* (1) that the purchase agreement for the sale of a holding was merely a joint application by the landlord and tenant to the Land Commission to assent to a contemplated sale, and to the same effect are the words of O'Brien J. in *Jackson and Verner* v. *Irvine* (2), whose judgment was approved and adopted by Sir Peter O'Brien C.J., where he says: "The Land Commission were to be the real purchasers. It was not the case of a collateral condition to be performed by a mere third party." I cannot, therefore, agree that a holding was sold either at the date of the purchase agreement, which was prior and precedent to the intervention of the Land Commission, or that the conditional sanction of the advance effected a sale under an agreement which itself was conditional upon an advance being made. Holmes L.J., in his dissenting and unfortunate judgment in *Sherlock's Estate* (1), which has been responsible from 1899 to 1915 for the wrongful diversion of the rents and profits, amounting in value to many thousands of pounds, from the devisees and heirs of vendors under these Acts who died pending completion of the sales, not only misconstrued the effect of the decision in the well-known case of *Lawes* v. *Bennett* (3) by holding that it decided that conditional contracts converted the estate in the lands from the date of their execution, and not from the date of the performance of the condition, but also that they were

(1) [1899] 2 I. R. 561, 591.

(2) 28 L. R. Ir. 473.

(3) 1 Cox. Ch. Cas. 167.

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absolute contracts from the same date—conclusions, I respectfully think, at variance with the settled principles of law, and certainly at variance with the unanimous judgment of the English Court of Appeal in *In re Marlay, Rutland* v. *Bury* (1). In the case of all such conditional contracts I have always thought the law to be as stated in Fry on Specific Performance, 5th ed., p. 481: "A contract may be originally conditional or contingent upon the performance of some act, or the happening of some event. Where that has occurred the contract becomes absolute. . . . But until it has thus become absolute no person can be entitled to its performance, or to sue for its non-performance." Consequently, while it has been held that in the case of an absolute contract the purchaser becomes in equity the owner from the date of its execution, it is equally well settled that in the case of conditional contracts he only becomes owner when the condition is performed. In the case of *Burdett's Estate* (2), recently so fully argued in this Court, able counsel on the one side contended that either party to these purchase agreements could, upon their execution, obtain, if not a specific performance, at least a mandatory injunction of some kind; but they frankly admitted they could not cite from our entire jurisprudence a single case in support of this proposition save *Beauclerk* v. *Hanna* (3), a case which, in my opinion, does not even remotely touch it.

It is of course quite true that even in a conditional contract each party to it can be compelled to play the part he has undertaken to fill, but this, in the case of the sale of a holding, is done by the landlord and tenant when they execute the agreement, and in the case of the sale of an estate, when the vendor asks to have his lands so declared, and when he and tenant agree the one to sell and the other to buy, in the event of an estate being sold which will include the particular holding, and in the event of the purchase price being advanced by the Land Commission. These agreements between the vendor and the tenants of particular holdings are essential preliminaries to the sale of an estate, but they cannot, in my opinion, be treated either as an agreement for the sale or as the sale of an estate which is not ascertained at the time nor until the third party to the transaction—the Land Commission—has discharged its duty by declaring the contents of the estate which it will allow to be sold. It is worth while mentioning that in his judgment in *Steele* v. *Steele* (1), Holmes L.J. practically states that he would not have decided as he did in *Sherlock's Estate* (2) if he could have found any authority enabling him to hold that in these purchase agreements the lands remained the real estate of the vendor until the conditions were fulfilled; but, though *In re Marlay's Estate* (3) had not then been decided, *Lawes* v. *Bennett* (4) is an express authority upon the precise point, and its effect in this respect was frequently applied in subsequent cases, and particularly by Chitty J. in *In re Isaacs, Isaacs* v. *Reginall* (5). The unqualified adoption by Wylie J. in *Doyle's Estate* (6) of this judgment in *Sherlock's Estate* (7) has been, as I have shown, responsible for the misappropriation in cases dealing with conversion, down to 1915, of very substantial amounts, but it will also be found by reference to his reported decisions on questions relating to the bonus that he bases his judgments upon the proposition that these purchase agreements under the Act of 1903 were absolute and complete contracts of purchase from their date, and that he invariably cites as his authority this judgment of Holmes L.J. But, as I have already said, the sole question for decision on this present appeal is as to the right of the respondents to be paid the percentage or bonus, and as this percentage or bonus is to be found for the first time in the Act of 1903, it is to it we must look for the determination of the question to be answered. This Act of 1903 may be said to have revolutionized land purchase in Ireland in so far as it for the first time legislated for the sale of "estates" as distinguished from holdings, and the considerations which I have urged as leading to the conclusion that a holding was not sold under the earlier Acts unless and until its purchase price was advanced by the Land Commission apply with intensified force to the Act of 1903, and lead, in my opinion, irresistibly to the conclusion that an estate is not agreed to be sold under that Act unless and until it has been declared by the Land Commission, nor is there any actual sale until the purchase-moneys have been lodged in the bank by the Land Commission, and made available for distribution to the parties entitled. By section 48 this percentage or bonus is expressly conferred as an aid and inducement to the sale of "estates," and is to be paid to the vendor of every "estate sold" under the Act, subject to the exception contained in the subsequent clauses of the section. If the word "owner" had been used instead of "vendor," I think the section would have been transparently clear, but in my opinion "vendor" here means a person with an actual as distinguished from a prima facie title, and contemplates the date of the actual sale as the time for proof of this title.

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(1) [1915] 2 Ch. 264.

(2) Unreported.

(3) 23 L. R. Ir. 144.

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(1) [1913] 1 I. R., at p. 314.

(2) [1895] 2 I. R. 561, 591.

(3) [1915] 2 Ch. 264.

(4) 1 Cox Ch. Cas. 167.

(5) [1894] 3 Ch. 506.

(6) [1907] 1 I. R. 204.

(7) [1899] 2 I. R. 561.

The key to the solution of the question for decision is to be found in the meaning of this word "estate," which is used usually throughout the section in the sense, not of the lands offered for sale, but of an "estate" as declared by the Land Commission under sect. 98, by which it is defined as "any lands which the Estates Commissioners may declare fit to be regarded as a separate estate for the purposes of the Act." The machinery of the Act is put in motion by the intending vendor filing with the Land Commission what is called the Originating Application, by which he requests the Land Commission to declare certain specified lands to be an "estate" under this sect. 98, and the Land Commission, if satisfied with the prima facie title of the intending vendor as a person having power to sell under sect. 17, make, before declaring an estate, such investigations as they deem necessary into all the material circumstances and conditions affecting the lands, and make an order either declaring the lands offered fit to be regarded as a separate estate or a portion only of such lands, or requiring the addition of other lands, the property of the intending vendor, or they may reject the application in toto.

It is material to remember that up to this stage the owner is under no obligation to have executed purchase agreements with the tenants of any of the lands, and though in some cases he may secure their execution by all or some of the tenants, in others he awaits the decision of the Land Commission as to the extent of the "estate" to be declared by them, through the not unreasonable apprehension that their decision may exclude from the "estate" and leave on his hands the least fertile or most congested portion of his property, in which case it would be his undoubted right to abandon his application and drop the entire proceeding. Assuming, however, that he is satisfied to proceed to the sale of such "estate" as may be declared by the Land Commission, he has then, if he has not done so already, to lodge purchase agreements between himself and the tenants of the holdings of the estate as so declared. This agreement, it is important to remember, is no longer conditional merely upon the proposed purchase price being advanced by the Land Commission. That condition is still retained, but a new and further condition is inserted, that an estate is sold which will include the particular holding of the tenant in the agreement. To meet the requirements of the Act of 1903 a new form of purchase agreement was essential, and, as prescribed by the Land Commission, it opens with these words, which govern the whole document: "In case an estate, of which the said holding forms a part, shall be sold under the provisions of the Irish Land Act of 1903," so that the agreement was no longer conditional merely upon an advance being made of the purchase-money, but also upon an estate being sold under the Act. It will thus be seen that so far as this latter condition is concerned it is identical in terms with the condition in sect. 48, upon the fulfilment of which the right to the bonus depends. Now, it is plain to demonstration that the words of this condition in the purchase agreement, "an estate shall be sold," refer to a future and subsequent event, and cannot possibly mean the date of the agreement itself, because whether these agreements are taken separately or regarded as a whole, each and all are conditional upon the future sale of an estate which will include them, and this sale is itself conditional upon an estate being declared, upon the sanction of the advances, upon the vesting of the holdings, and upon the advances being made, and no single one of these stages in the present case was reached until twelve years after the date of the agreements.

When we find that from the very initiation of the proceedings these words, "an estate sold" or "the sale of an estate," when

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used to express the condition precedent to the performance of the agreement, can only mean the actual sale, it would require coercive considerations, of which I cannot find a trace either in reason or policy, to lead me to the conclusion that they are to be construed in a wholly different sense when made the condition precedent to the payment of the percentage or bonus. Whatever ambiguity there may be under the earlier legislation in the use of the words "sale of a holding" or "lands sold" in the earlier legislation, I have failed to find any as to "the sale of an estate" or "an estate sold" in the Act of 1903 and the subsequent legislation.

I have already pointed out that "declared an estate" in the originating application and "in case an estate shall be sold" in the purchase agreement plainly contemplate a stage subsequent to the date of the purchase agreements. The precise words are again to be found in sect. 24, sub-s. 8, of the Act, where they are used in the same sense, and where the clearest distinction is taken between their date and that of the purchase agreement. The words are: "In the case of the sale of an estate, where at the date hereinafter mentioned arrears of rent were due in respect of any holding on the estate, a sum equivalent in amount to those arrears, but not exceeding in any case one year's rent, shall be paid out of the purchase-money to the person who would have been entitled to receive those arrears for his own use. The aforesaid date shall be, in the case of an estate purchased by the Land Commission, the date of the agreement for that purchase, and in the case of an estate purchased by other persons the date of the agreement for the purchase of the holding." I need hardly labour the point that the date "hereinafter mentioned" is one different from and antecedent to that of the sale of the estate and the distribution of the purchase-money. Had this not been so, it would have sufficed to say, "where on the sale of an estate arrears of rent are due," etc.; and the definition of "the aforesaid date" would have been entirely superfluous. Further, it cannot be contended that by confining the right to the arrears to those due at the date of the purchase agreement this date is made by the section the same as the date of the sale of the estate, and yet this is precisely the use that is sought to be made of the analogous sect. 35 of the

1896 Act, which provides for the payment of interest in lieu of rent for the interval between the date of the purchase agreements and the completion of the sale.

Another striking illustration of this cardinal distinction between the two dates is to be found in the same sect. 24, sub-s. 1. It reads: "In the case of the sale of an estate to persons other than the Land Commission (by which is meant a sale to the tenants), so soon as the holding or parcel of land comprised in the estate is vested in the purchaser, the Land Commission shall . . . pay the purchase-money into the Bank of Ireland, and make an order attaching claims to the purchase-money," etc. It is upon the strength of this sub-section that Wylie J. in *Croker's Estate* (1), to which I shall afterwards refer, decided, to quote his own words, that "so far as agreements for sale under the Act of 1903 are concerned, all the conditions upon which the carrying out of the agreement depends must be fulfilled prior to the vesting order or lodging the money in bank. In the words of sect. 24, sub-s. 1, it is only 'in case of the sale of an estate' that the vesting order can be made or the money lodged in bank; and an 'estate' is not sold until it has been declared by the Estates Commissioners and the advances for all the holdings comprised in it have been sanctioned." If you substitute "made" for "sanctioned," this is precisely the proposition that I have been contending for throughout, though, as I shall subsequently attempt to prove, it is entirely at variance with his conclusions in the previous cases of *Doyle's Estate* (2) and *Barton's Estate* (3).

The many and definite stages on the road to the actual sale, to which I have just referred, and which are all subsequent in date to the execution of the purchase agreements, accentuate the difficulty of holding that the estate has been sold at their date. Thus it is plain that the mere execution by the owner and tenant of an agreement for the purchase of his holding, even in a case where it has been executed before the estate has been declared, is no guarantee that this particular holding will form part of an estate to be sold. It may be excluded from the area of the estate as declared, and even if included the tenant has still to run the

(1) [1913] 1 I. R. 522. (2) [1907] 1 I. R. 204.
(3) [1909] 1 I. R. 205.

risk of being excluded at a later stage owing to the Land Commission refusing to sanction any advance or insisting as a condition to doing so that the agreed purchase price shall be materially reduced. Further, it is still open to the Land Commission, when they reach the stage of the order vesting the holding in the tenant-purchaser, to make the order subject under sect. 32 of the Act of 1896 to such conditions, modifications, and exceptions as they think necessary. To say that "an estate is sold" within the meaning of sect. 48, or wherever else these words are to be found in the Act, or in the rules and forms prescribed thereunder at the date of the conditional agreement of purchase, is to ignore the fact that there are three parties whose consent and co-operation are essential to the sale of an "estate": the vendor, the particular tenants whose holdings are included in the "estate" as declared, and last, but not least, the Land Commission, who play the dominant part in the transaction, beginning with the declaration of an estate which, as was decided by this Court in *Weir's Estate* (1), is a judicial act and "a condition precedent to putting the provisions of the Act into execution for the purpose of carrying out a sale of any lands."

The conditional contract contained in the purchase agreement between the vendor and each separate tenant fulfils the part that each has consented to play, that is to say, the vendor's obligation to sell the particular holding and the tenant's to purchase it, provided first that the holding is included in the estate to be thereafter sold; and, second, that the agreed purchase price is provided by an advance of the amount by the Land Commission. How, therefore, is it possible to hold that an estate has been either agreed to be sold or sold within the meaning of the Act at the date of the execution of the purchase agreements, whether that date be fixed by the time when the first, the majority, or the last has been executed? To do so in the present case, in which all the agreements were executed in or about 1907, but no estate even declared or a single advance sanctioned until 1919, would be to hold that the estate was agreed to be sold twelve years before it had any existence, and before it was ascertained whether one or more of the holdings would or

(1) [1908] 1 I. R. 161.

would not be included, or the advance of a single penny of the purchase-money sanctioned or made.

Once it is remembered that these agreements are for the sale of particular holdings, as distinguished from the sale of an "estate," as defined by the Act, it seems transparently clear that they are wanting in all the essentials to a contract for the sale of such an estate. There are two essential conditions to a binding contract for the sale of any estate in lands—the determination of the lands to be sold, and of the price to be paid. At the time when the purchase agreements in the present case were executed the subject-matter of the estate to be sold had not been ascertained or declared, the purchase price has not been fixed, nor could it be until the estate is declared, and even after this stage is reached the Land Commission frequently require a modification in the purchase prices, and insist upon their reduction as a condition to their sanction or making of the advances, while even the conditions, exceptions, and modifications to which the estate of the tenant purchaser is to be subject await the subsequent determination of the Land Commission when they come to vest the holding in him. Again, if an "estate" can be said in any sense known to the law to be sold at the date of the purchase agreements, it must, in my opinion, necessarily follow that the lands comprised in it have been converted from the same date, with the result that in the case of a vendor who dies pending completion the rents and profits in the interim must pass from the devisee or heir-at-law to the personal representatives. As to this, it is sufficient to say that whether the opinion of Palles C.B. in *Steele* v. *Steele* (1), that no conversion arises under the Act of 1903 in any case in which the vendor has died pending completion of the sale, be adopted or not, it is now clear on the authority of *Lawes* v. *Bennett* (2), as explained in *In re Isaacs* (3) and in *Marlay's Estate* (4), that, if a conversion does take place, it is only from the date of the performance of the condition, and not from the date of the agreement.

Finally, I attach the greatest importance in this connexion to the fact that the Act of 1903, as well as the subsequent legislation, is framed on the assumption that the ascertainment of the

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(1) [1913] 1 I. R. 292, 299.
(2) 1 Cox Ch. Cas. 167.
(3) [1894] 3 Ch. 506.
(4) [1915] 2 Ch. 264.

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true title to the bonus and the purchase-money is postponed to the final stage in the completion of the sale of an estate. Sect. 17, following the lines of the somewhat analogous sect. 14 of the Act of 1887, so far as the distribution of the purchase-money is concerned, enables the Land Commission to treat any person who can furnish prima facie evidence of his power to sell, as the owner for all purposes other than the distribution of the purchase-money and the payment of the bonus. As to the purchase-money, the distribution under the Act of 1903, both in the case of direct sales by the vendor to the Land Commission, and of sales of estates through the medium of purchase agreements between the vendor and his tenants, is, under sects. 16 and 24, the final stage in the completion of the sale, following in the one case the vesting of the estate by the Land Commission in themselves, and in the other by the vesting of the holdings included in the estate as declared, in the tenant purchasers thereof. Likewise as to the bonus, because it, under sect. 48, is to be paid at the prescribed time, which, in obedience to sect. 17, is fixed by the rules of 2nd July, 1910, as "the time of the distribution of the purchase-money, or such other time as the Judicial Commissioner may order," but "such other time" must be a date not earlier than the distribution of the purchase-money, inasmuch as a certificate of the amount payable, signed by the Judicial Commissioner, is made a condition precedent to payment of the bonus; and this certificate cannot be obtained until after the purchase-money has been advanced by payment into the bank. It will thus be seen that up to this final stage the whole proceedings are carried out on the strength of a mere prima facie title in the vendor, and that it is only when the stage is reached for the distribution of the purchase-money and payment of the bonus that strict proof of actual ownership is required.

The fact that the Land Commission have thus prescribed in conformity with sect. 17 that the bonus cannot be paid before the distribution of the purchase-money, which is the final stage of the actual sale, but may be paid after that date, is most significant; and this consistent legislation satisfies me that its object was to expedite the transfer of ownership from landlord and tenant by deliberately postponing all questions of title to purchase-money or bonus, with neither of which was the tenant concerned, until after the vesting orders were made, and the final stage reached in the completion of the sale. It is true that in the practice of the Land Commission, and, perhaps, inevitably so in the necessity for dealing with proposed sales in the priority of date in application, these final stages are practically contemporaneous with the vesting orders. In the present case the originating application was filed and the purchase agreements executed in 1907, but it was not until 1918 that the Land Commission gave themselves jurisdiction to deal with the matter at all by declaring an "estate," and this step was followed by the conditional sanction of the advances, the charging of the holdings with the purchase annuity, the vesting orders, the making of the advance by the lodgment in bank, and the order attaching all claims thereto. Consequently, it seems to me to follow that the status of the vendor, for both purposes, the distribution of the purchase-money and the payment of the bonus, must be, at the earliest, his status when an estate has been declared, and not at the date of his originating application, or of the execution of the purchase agreements.

It would be a strange result if the vendors in the present case by postponing, as they were at liberty to do, the execution of these agreements until the "estate" had been declared, that is to say, until 1918, five years subsequent to the time when they became owners in fee, could, as it has been admitted they could, receive payment of the bonus, but are to be deprived of it, because these agreements were in fact executed prior to that time. Take also the case, not exceptional in practice, of a person who has been dealt with as the true owner under sect. 17 throughout the proceedings, but whose absence of title is, and could only be, discovered when the time arrives for the distribution of the purchase-money and the payment of the bonus. Is he to get the bonus by reason of the fact that he was treated as the owner, and has been the actual party to the purchase agreements? The answer is obvious; but, on the other hand, is the real owner to be deprived of it as not being the person who lodged the originating application or entered into the agreements? He is irrevocably bound by the proceedings once these holdings have been vested in the tenants, as they thereby, under the legislation, acquire an indefeasible estate; but is he, in addition to finding his estate in the lands gone, without notice to him and without his consent, also to forfeit the bonus? Such a result would obviously be unjust, but would not ensue if the test of his right is his status at the date of the sale of an estate in the sense I have explained.

In *Brew's Estate* (1), an instance of a case of this kind, Wylie J. held that the true owner was entitled to the bonus, but upon the fiction that the person dealt with as the owner under sect. 17 was his "statutory" agent. While I agree in his conclusion, I can neither understand nor accept the fiction upon which he bases it; and while I agree that he has been divested of his estate in the lands, I attribute this result, not to an agency which never existed, but to the compulsory powers of sect. 17, which I regard as analogous in their results to a notice to treat, and I find his right to the bonus to rest on the fact that his title as owner was proved before, in the words of sect. 48, an estate was sold. As a further example, I take the case of a person who, having been treated as the owner under sect. 17, and, after the execution of agreements with his tenants, turns out not to have been the true owner at the time, but who before the date for the distribution of the purchase-money and the payment of the bonus acquires the ownership by descent, purchase, or otherwise. If he is to get the bonus, as I think he clearly should, it can only be upon the ground that he had clothed himself with the necessary status before the prescribed time. But if this is legitimate in the case of a person who has no title either to originate the proceedings or to enter into the purchase agreements, why is it not to apply to a case like the present, in which the vendors had a title to sell ab initio, and four years prior to an estate being sold had exchanged this title for that of owners in fee?

Upon the other hand, if an estate is to be treated as sold, for the purposes of sect. 48, as of the date of the purchase agreements, it necessarily follows that this date must be of an uncertain and fluctuating character, where the agreements, as often happens, are executed at different and distant dates. The argument for the appellant has fastened itself upon the date of the last of the agreements, by which I assume is meant the last of the agreements which are included in the estate as subsequently declared and sold. If this contention is accepted, it must inevitably follow that in an estate comprising, as estates frequently do, several hundreds of holdings, vendors who executed every agreement but the last as mortgagees in possession would, if before the date of its execution they acquired the ownership in fee, be entitled to the bonus; and, if they can do so at this stage, upon what reason or principle can they be prohibited from doing so at any other stage antecedent to the actual sale? It may be that upon any construction of this sect. 48 exceptional cases can be suggested in which a particular vendor would or would not be entitled to the percentage contrary to the presumed intention of Parliament; but in such cases which have occurred under other Acts the remedy is for Parliament, and not for the Courts.

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(1) [1912] 1 I. R. 22.

The expression "sale" in the case of lands means in judicial diction the actual or executed contract of sale, unless where the context otherwise requires; while, in the case of goods, this distinction as to conditional sales is the subject of express legislation: Sale of Goods Act, 1893, sect. 1. Lord Justice Ronan since the argument has called my attention to sect. 6 of the Act of 1909 as strongly supporting the view that the date of the sale of an estate under sect. 48 of the Act of 1903 is the date of the agreement of sale as fixed by the date of the execution of the latest of the purchase agreements, and it illustrates the difficulties which surround this complicated question when I state that to my mind this section has precisely the opposite effect. This Act of 1909 substituted for the uniform bonus of 12 per cent. on the aggregate of the purchase-moneys under the Act of 1903 a bonus upon a graduated scale "on the amount advanced in respect of each holding and parcel of land comprised in the estate." These latter words are in themselves significant as establishing that it is not on the amounts agreed to as between the landlord and tenant that the bonus is paid, but upon the amounts that have been advanced by the Land Commission, which may be, and often are, something much less. In thus interfering, to the prejudice of vendors in certain cases, with the pre-existing scale or measure of the bonus, it was manifestly

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equitable that the Legislature should provide for pending cases, and this was done by sect. 6 referred to, by which it was provided that the percentage payable upon the purchase-money of an estate containing or including purchase agreements entered into, or deemed to have been entered into, on or before the 24th November, 1908, should be calculated at the rate in the Act of 1903. This section was intended to preserve the vendor's right in the case of pending and uncompleted sales; but if the right accrued, as contended, at the date of the purchase agreements, then this section was entirely superfluous, as nothing but express legislation could deprive the vendors in such cases of a right which had accrued prior to the Act; but if the right, on the other hand, depended upon the actual or completed sale, some provision of this nature was obviously just and proper. It will be observed that this section describes the bonus as payable upon the purchase-money of an "estate," or, in other words, upon the sale of an "estate"; and the distinction between the agreement of sale and the sale itself is observed throughout the Act, both in the case of an estate and a holding. See, for example, sects. 23 and 30.

I now pass to an analysis of the decisions upon this question, and I hope to demonstrate that, so far as this Court is concerned, it has decided, first, that the words "an estate sold" mean throughout the entire sect. 48 the same thing, and must receive the same uniform construction; and, second, that the date contemplated by the section is that of the actual sale, and while, had this been a case of first impression, I would have decided to the same effect, I am justified by the conviction that in so deciding I am implicitly carrying out the law as interpreted by my predecessors in this Court. Now, it is at least certain that in every case which has been cited the date has been held to be that of "the sale," and that in no previous case has it ever even been suggested that this date is that of the originating application. This document in substance and fact is nothing but a tentative request by the assumed owner of certain lands to the Land Commission to have these lands declared an "estate" with a view to a contemplated sale under the Act; and I entertain no doubt that such owner, if dissatisfied with the action of the Land Commission

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in declaring something less than the lands proposed to be an estate, could before he had entered into any agreements with his tenants decline to proceed with the contemplated sale. Otherwise he might be exposed to the grave injustice of being coerced to sell the more fertile portions, and be left with the uneconomic or congested portions on his hands. Further, I am satisfied that the decision of Ross J. in this very case, from which there has been no appeal, and in which he held that the originating application could not act as an estoppel upon the vendors or be treated as a proceeding in a cause or matter amounting to an acknowledgment of the title of the mortgagor so as to defeat the Statute of Limitations, and his consequent refusal to strike out from the Final Schedule of Incumbrances the vendors' assertion of title as owners in fee negatives any question as to the date of the sale being that of the originating application. In this connexion it is still more important to remember that, although these purchase agreements were admittedly executed at a time when the vendors were mortgagees in possession, and would consequently have effected the sale of the estate, if the appellant is right, at a date antecedent to their acquisition of title as owners in fee, no such contention is hinted at in the arguments or judgment of the learned Judge. The real purpose of the application by the Official Assignee was to capture the bonus. This appears from the report in the January number of the Irish Law Reports, 1920, in which it is stated that the mortgagees claimed the residue and the bonus as the owners under the Statute of Limitations, while the Official Assignee relied upon the originating application as an acknowledgment of his title to both residue and bonus. It is obvious that this dispute as to the destination of the bonus was the merest exercitation if the estate had been sold by mortgagees in possession, as on that assumption no bonus was payable to anyone; and I am satisfied, from his long and varied experience in the judicial construction of these Land Purchase Acts, that this fact was present to the mind of Ross J., and that in holding as he expressly did that the mortgagees were the owners, he intended to decide, and did in fact decide, that as such owners they were entitled to the bonus. It was in this sense that his decision was construed by the Treasury Solicitor, and it was upon this ground that he declined to contest the question before Wylie J. The portion of sect. 48 which directly raises the question at issue here is sub-sect. 4: "This section shall not apply to any estate sold by the Land Judge where the estate is so circumstanced that it would, independently of the Act of 1896, be sold without the consent of the owner as to price, or to any estate so circumstanced in respect of which an absolute order for sale by the Land Judge was in force at the date of the passing of this Act, or to any estate sold by a mortgagee in possession." The words "so circumstanced," &c., in this sub-section may for all practical purposes be read as equivalent to "insolvent," and therefore it may be read in this way: "This section shall not apply to any insolvent estate sold by the Land Judge, or to any insolvent estate in respect of which an absolute order for sale by the Land Judge was in force at the date of the passing of this Act, or to any estate sold by a mortgagee in possession." It will be observed that in the second of these three excepted cases the word "sold" is not repeated after the word "estate," but as they are exceptions to the right to the bonus conferred by the earlier portion of the section, and as this right is expressly conferred only in the case of "each estate sold under the Act," it is obvious that the word "estate" in this second exception means "an estate sold under the Act."

In *Barton's Estate* (1) the facts were few and comparatively simple. A petition for the sale of the lands was presented by an incumbrancer in the Land Judge's Court, formerly known as the Incumbered Estates Court, and the conditional order for sale, made on this petition, was made absolute on the 7th April, 1903, but on the 11th November, 1903, the petition for sale was dismissed with the consent of all the incumbrancers. At the time of these proceedings the estate was upon the figures insolvent both as to capital and income, but subsequent to the dismissal of the petition the owner induced certain of the incumbrancers to apportion their charges between the lands in question and other lands subject thereto, while others who were near relatives released the lands from a jointure and annuity, with the result that they were restored to solvency as to capital. He then instituted the appropriate proceedings for the sale of the lands under the Act of

(1) [1909] 1 I. R. 205.

1903, and at this date, although the lands were solvent as to capital, the annual outgoings exceeded the rental; but at a subsequent date, not fixed by the report of the case, certain incumbrancers agreed to accept their interest at a reduced rate, thereby creating a surplus of income. The vendor applied for the "bonus" on this sale at the prescribed time, that is to say, on the completion of the sale, but his claim was resisted by the Treasury, who contended that the question of solvency depended upon the "circumstances" of the estate at the time of the passing of the Act; but Ross J., with a judicial experience of over twenty-four years in the interpretation of those Land Purchase Acts, decided in unequivocal language that the true date was that of the sale of the estate, in the sense of the actual or completed sale. He says, at page 207 of his judgment: "There are two parts to the sub-section; each contemplates the case of an estate ordered to be sold in the Land Judge's Court. The first part deals with the case where the actual sale takes place in the Land Judge's Court. It is admitted that in the first case the date when the estate was 'so circumstanced' is the date of sale." This is a plain decision that the date in the first part is not the date of the absolute order for sale, but of the actual or completed sale. He then says: "I think the crucial time in the second part is the same as the time indicated in the first part—namely, the date of sale . . . The owner is to have the stimulus of the bonus so long as he has a voice in deciding whether the estate is to be sold or not. If the estate is solvent, he has a right to be heard up to the time when the sale takes place, and the bonus is given to encourage him to sell. If the estate is insolvent at the time of the sale, he has no right to be heard at all, and he does not get the bonus." When read with the previous passage from his judgment, it is certain that in using these words, "when the sale takes place" and "at the time of the sale," he was referring to an actual or completed sale, and not to the date of the antecedent proceedings in the Land Commission, to which he does not even refer in his judgment.

In the Court of Appeal (1) the Master of the Rolls and Holmes L.J. simply expressed their concurrence in the judgment

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(1) [1910] 1 I. R. 100.

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of Ross J. for the reasons stated by him, but Palles C.B., while stating that he concurred "for the reasons succinctly stated in the judgment of Ross J.," proceeds in lucid and precise language to explain the purpose and effect of the sub-section. "The sub-section," he says, "deals only with estates sold. Everything within the sub-section is an estate sold, and the right to the percentage is given solely to owners of estates sold, and is so given by reason of the sale." He then states that the sale contemplated by the first limb of the sub-section is clearly the actual sale, and that the words "so circumstanced" in the second limb mean "so circumstanced" at the same date as in the first. We, therefore, have to construe a sub-section which contains three exceptions to the right conferred to the bonus, the first two of which depend on the status of the estate when sold, and the third, which is the present case, on the status of the vendor at the same date. In the words of Palles C.B., "everything within the sub-section is an estate sold in the sense of an actual sale"; and I emphasize the fact that nowhere throughout this judgment or that of Ross J. is there the slightest reference to the purchase agreements as even remotely bearing upon the construction in this respect of the sub-section.

Prior to the date of the actual sale in the present case the title of the vendor as owner in fee since 1915 was recorded in the Schedule of Incumbrances as finally settled, and its right to remain there was determined by Ross J. in a decree which has not been assailed, thereby conclusively establishing the vendor's status as owner in fee at the crucial date. I accept the contention of counsel for the appellant that this decision by this Court in *Barton's Estate* (1) is difficult to reconcile with the previous decision by Wylie J. in *Bandon's Estate* (2), and by this Court in the subsequent case of *Thomson's Estate* (3), an unreported case, of which, however, there is a careful record in Mr. De Versan's valuable book, to which we had access. The question in *Bandon's Estate* (2) did not turn upon the same sub-section of sect. 48 which had to be construed in *Barton's Estate* (1) and on this appeal, but on the proviso to sub-sect. 1.

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(1) [1910] 1 I. R. 100.
(2) [1907] 1 I. R. 226.
(3) [1912] 1 I. R. 466, note.

It reads: "Provided that, where an estate is so incumbered that the vendor is not entitled to receive for his own use any part of the rents or profits thereof, or where the percentage is payable in respect of an estate sold by the Land Judge, the percentage shall be added to the purchase-money, and shall not be paid to the vendor." For the purpose of *Bandon's Estate* (1) Wylie J. had to determine the date at which it is to be ascertained whether the vendor was or was not entitled to receive for his own use any part of the rents and profits of it. He first deals with the question as to the meaning of "estate" in the proviso, and decides that it does not mean the entire lands of the vendor, nor the portion of them subject to the mortgages, but only the "estate" as declared by the Estates Commissioners under sect. 98; and it is here important to note that this same meaning has been usually given to this word "estate" wherever it is found throughout sect. 48. He then summarily disposes of the question of the date in the following brief sentences: "But then what is the meaning of 'so incumbered that the vendor is not entitled to receive any part of the rents and profits for his own use'? Does it mean at the time of the passing of the Act or at the time of sale? It cannot mean, I think, any later date, because no rents or profits of the lands sold are payable after the date of the agreements. But which of the other two dates is the time at which the title to receive is to be ascertained? Well, as the bonus is expressly given as an aid to the sale, it appears to me that the time of ascertainment must be the date of sale." In so far as he holds the date to be that of the sale, he is in accord with the decision of this Court in *Barton's Estate* (2); where he diverges is in fixing this date as that of the purchase agreements. His reasons for this divergence are to be found in the single sentence I have quoted: "Does it mean at the time of the passing of the Act or at the time of sale? It cannot mean, I think, any later date, because no rent or profits of the lands sold are payable after the date of the purchase agreements." I have puzzled long and anxiously over these words, but to me they have been and still remain wholly incomprehensible. I entertain myself the gravest doubt, especially in the light of a subsequent

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(1) [1907] 1 I. R. 226.

(2) [1910] 1 I. R. 100.

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decision by the same learned Judge, whether they were really used in the sense contended for by the appellant, and adopted by the agreement of counsel in *Thomson's Estate* (1), that is, as fixing the date as of the time of the purchase agreements.

When he speaks of a date later than the time of sale, I should have thought he meant a date subsequent to the sale; but if he meant, as contended for here, that the date of sale must and can only be the time of the purchase agreements by reason of the fact that from that date no rents or profits of the lands sold are payable to the vendor, then, with all respect, I can only say that he is absolutely wrong, both in fact and in law. He is plainly referring to the familiar sect. 35 of the Act of 1896, which suspends the right of the vendor to the receipt of rent, pending completion of the sale, from the date of the purchase agreements, but provides that the tenant is to pay interest on the purchase-money from the date of his agreement until the date from which the purchase annuity begins to run, or, in other words, until after the date of the vesting of his holding in the tenant; but should the advance for any reason be refused, and the contemplated sale as a consequence fall through, the tenant must account to his landlord for the interim rent and arrears after setting off the interest paid. This interest is to be collected by the Land Commission, and paid by them during the prescribed interval to the owner for the time being. I cannot possibly accept the suggestion that the landlord while in receipt of this interest is not in receipt of profits of the land within the meaning of the proviso when it advisedly speaks of the rents or profits. This provisional arrangement pending completion of the sale is analogous to, but not identical with, the usual condition in absolute contracts of sale, with this cardinal distinction, that the purchaser in such cases is generally a stranger to the lands, whereas under the Land Purchase Code the interest is paid by the tenant out of the profits of the lands precisely to the same extent as if the interest was rent. Further—and this point was, I think, completely overlooked in the argument—this sect. 35 of the Act of 1896 is universally applicable to all "estates" sold under the Act of 1903, including all those dealt with by sect. 48, and if the meaning Wylie J. attributed to the language of it is correct this Court went egregiously wrong in deciding in *Barton's Estate* (1) that the date for ascertaining the status of the "estate" as to solvency was the time of the actual sale, and not a date antecedent to the time when the "estate" had been ascertained. But there is another plain and obvious fallacy underlying the decision of Wylie J. if it is to be interpreted as contended for here, because it involves the use by him of sect. 35 of the Act of 1896 as the test determining whether, under the proviso of sect. 48, sub-s. 1, the vendor was entitled to receive any part of the rents and profits for his own use, whereas in truth and in fact the special case provided for is that in which he is disentitled by reason of the insolvency of the estate, and not as the result of this interest section, which, as I have shown, is applicable to all "estates" sold under the Act, whether incumbered or not.

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(1) [1912] 1 I. R. 466, note.

I pass now to *Thomson's Estate* (2), in which counsel for the parties by consent and without argument adopted, on the authority of *Barton's Estate* (1), the date of the purchase agreements as the date of the sale. Upon the facts of that case as they appear in the Registrar's notes, and in the report of another case in the same estate, *Thomson's Estate* (2), it was immaterial whether this date or that of the actual sale was accepted, because the condition of the estate as to solvency—the question for decision—was the same at both dates; but what has to be specially noted is that the decision of this Court in *Barton's Estate* (1) was completely overlooked, not only by the counsel in the case, but also by the members of the Court which decided it, a result probably due to the consent of the parties and to the absence of any issue (upon the special facts of *Thomson's Estate* (2)) arising as between the date of the purchase agreements and that of the actual sale. They even escaped the vigilance of Holmes L.J., the only member of the Court who was a party to both decisions, and I can only attribute this omission and his statement, that "for himself he could not see what other date it could be except that of the purchase agreements," to a recollection of his judgment in *Sherlock's Estate* (3), in which in substance he based his

(1) [1909] 1 I. R. 205; [1910] 1 I. R. 100. (2) [1912] 1 I. R. 466, note.
(3) [1899] 2 I. R. 561, 591.

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erroneous conclusions upon the interest section, sect. 3 in the Land Purchase Act, 1888, which, by the way, had been repealed three years before, and replaced by this sect. 35 of the Act of 1896, on which Wylie J. relied. That he should have forgotten his previous concurrence in *Barton's Estate* (1), with the judgments, on precisely the same sub-section, of Ross J. and the Master of the Rolls and Palles C.B., is all the more remarkable, as he was not only party to but delivered an important judgment in the previous case of *Boyle's Estate* (2), decided by this Court in 1909. The proceedings in that case had been taken under the Act of 1903, but under the sections dealing with the sale of holdings as distinguished from "estates," and it was held by this Court, affirming Ross J., that this bonus sec. 48 did not apply in such a case, but only in cases in which an "estate" had been declared and sold under the Act. FitzGibbon L.J. says: "I must regard sales 'under the Land Purchase Acts' as a genus, one distinct species of which consists of sales 'under this Act' for the purpose and within the meaning of sect. 48, sub-s. 1, of the Act of 1903. That being so, the test, whether any particular sale comes within the species and carries the right to bonus, is whether the lands sold have been declared a separate estate by the Estates Commissioners." He plainly did not mean by these words that the date when an estate was sold under the section was the date when it was declared, but merely that such a declaration was, to again quote his words in *Weir's Estate* (3), a condition precedent to putting the provisions of the Act into force for the purpose of carrying out a sale of any lands. Holmes L.J., having pointed out the distinction between the sales of holdings under the earlier legislation and the sales of "estates" under the Act of 1903, says, on page 292: "The practice of the Land Judge's Court and of the Land Commission since the statute of that year (1903) became law has been to show that the distinction between the two classes of sales has been clearly recognized. Separate forms are provided for each class, the essential difference between them being that in the one case there is not only an application to the Land Commission for an advance of the sums required to carry out the

(1) [1910] 1 I. R. 100. (2) [1909] 1 I. R. 278.
(3) [1908] 1 I. R. 161, 172.

agreements to purchase, but also an application to the Estates Commissioners to declare the lands agreed to be purchased a separate estate." Later on he says that he has no doubt that the expression "sale of estates under this Act" in the opening words of sect. 48 "govern every portion of the section." If he is right in this, then it must govern the words "an estate sold by mortgagees in possession," and it must also follow that no such estate can be said to be agreed to be sold or to be sold unless it has previously been declared an "estate under sect. 98." In every line of this judgment he is in thorough agreement with *Barton's Estate* (1), but wholly at variance with *Thomson's Estate* (2).

Finally, I think that Mr. Justice Wylie himself deliberately abandoned his decision in *Bandon's Estate* (3) by his judgment in the subsequent case of *Croker's Estate* (4) in 1913. By no ingenuity can I reconcile this decision with *Bandon's Estate* (3), and can only conclude that the learned Judge loyally adopted in *Croker's Case* (4) the decision of this Court in *Doyle's Estate* (5) and *Barton's Estate* (1). Dealing there with precisely the same words in sect. 24 of the Act of 1903, that we have to construe in sect. 48, "the sale of an estate," he says an "estate" is not sold until it has been "declared" by the Estates Commissioners and the advances for all the holdings comprised in it have been sanctioned. It may be necessary for me on another occasion to give my reasons for the opinion which, as at present advised, I strongly hold, that an estate is not sold merely on the sanction of the advances, so long as that sanction is conditional only. I can understand the proposition if the sanction when given was final and irrevocable; but a conditional sanction is an entirely different matter. This question does not arise for decision upon this appeal, because as the result of the vindication of his claim before Ross J., to have his name returned on the final Schedule of Incumbrances in this case as owner in fee, we have it on record that this was his status from 1915, that is to say, four years before either an estate was declared, a single advance sanctioned or paid, or a single holding vested in the purchaser. I therefore hold myself bound, both in principle and by the authority of this Court, to decide that the status and only status which the vendor had entitling him to carry on the proceedings for a sale, from the year 1915, was that of owner in fee; and as this was his status at the date when the estate was declared and at the subsequent sale, he is within the express language of sect. 48 entitled to the bonus, whether the crucial date be that of the declaration of the estate or that of its actual sale. I am conscious that this judgment has run to an inordinate length in an attempt to prove that the words, "an estate sold under the Act," mean what they say; but the confusion and uncertainty that for years enveloped the analogous words, "sale of a holding," under the earlier legislation, with the consequent misapplication of enormous amounts, and the knowledge that our decision must determine the destination of substantial amounts in the future, have prompted me to an exhaustive inquiry, in the earnest desire to rescue this question from doubt or uncertainty, nor was I unmindful that, while "brevis esse laboro, obscurus fio."

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(1) [1910] 1 I. R. 100.
(2) [1912] 1 I. R. 466, note.
(3) [1907] 1 I. R. 226.
(4) [1913] 1 I. R. 522.
(5) [1907] 1 I. R. 204.

MOLONY C.J.:—

I have had an opportunity of reading the judgment which is about to be delivered by the Master of the Rolls. I find myself in agreement with it, and have nothing to add.

O'CONNOR M.R.:—

In this matter an originating application for the sale of certain lands under the Irish Land Act, 1903, was filed in the Irish Land Commission on the 25th October, 1907, by Huddleston and O'Connell. In the application they describe themselves as mortgagees in possession, and averred that as such they had a power of sale. The express statement that the applicants were mortgagees in possession with power of sale was made for the purpose of bringing the case within sect. 42 of the Act of 1896, which enacts that a mortgagee in possession with power of sale shall for all the purposes of the Land Purchase Acts be deemed to be a landlord.

The application was accompanied by the several agreements entered into by the owners with the purchasing tenants. As I understand the procedure which obtains in the Irish Land Commission, an owner has substantially done his part in carrying out the sale once he has filed his originating application, accompanied by the agreements for sale and maps of the property. It remains then for the Commission to complete it. There is no conveyance to be executed by the owner. The transfer of the estate of the owner to the purchasing tenants is effected by means of vesting orders. It is not necessary for the purpose of the sale for the owner to show title to the lands sold further than he has already done by his originating application, because as soon as the advance is made and the holdings are vested an order is made attaching all claims which had previously affected the lands to the purchase-money. The owner, therefore, has to show title, not to the lands, but to the purchase-money. In fact, the only contribution of the owner to the procedure for carrying out a sale is the making of the agreements, bringing them before the Land Commission, and giving prima facie evidence that he is a person who has power to sell under the Land Purchase Acts. If, therefore, it becomes necessary for any purpose to determine the character in which the owner sells, it is necessary, I think, to refer to the initial stage in the proceeding.

In the present case the owners agreed to sell in their character of mortgagees in possession, and it was in that character they claimed the right to deal through the Land Commission, and it was in that character the Commission accepted them as owners. Therefore I come to the conclusion that so far as there was any sale, whether executory or executed, whether absolute or conditional, by the owners, that sale took place when they bore the character of mortgagees in possession, and in fact were such. I assume that in the year 1914 the vendors lost the character of mortgagees in possession, and became and thenceforward remained the absolute owners, but during this period I can find no essential act done or to be done by them. It remained for the Land Commission to do everything material. But further it is to be observed that the owners maintained the character of mortgagees in possession in the Land Commission to the very end. If a person institutes proceedings in a special character, he must be taken to have maintained the same character until he formally

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notifies a change in it. There was no such notification here, although the rules of the Land Commission provide in the case of a change of interest for a continuation of the proceedings in the altered character. The owners continued in the proceeding as they had begun it, and I do not think it is now open to them to say that in the later stage they acted otherwise than as mortgagees in possession. Nor can it be said that having become absolute owners they must be taken as having thenceforward acted as such, because it has been decided that a mortgagee who has become absolute owner under the Statute of Limitations may nevertheless sell under the power of sale contained in the mortgage: *In re Alison* (1). For these reasons I would (were it not for the fact that I differ from the Lord Chancellor) feel quite certain that the present case comes within the exception to sect. 48, the estate having been sold within the meaning of that section by mortgagees in possession.

I am confirmed in this view by the opening words of the section: "For the purpose of aiding the sale." It is universally admitted that this means giving an inducement to sell, and surely the thing to be induced is the making of agreements for sale. The inducement helps the initiatory state, and this, to my mind, puts a meaning on the words "sale" and "sold" in the section.

So far I have not said anything of the sense in which the words "sale" or "sold" are used throughout the Land Code. I do not think that in an effort to find the meaning of the same words in sect. 48 anything is to be gained by a minute examination of all the Land Acts. Suffice it to say that these words are used in different senses in the several Acts, to suit the special purposes of the particular enactments, and it would be too much to expect that in a long and complicated code, dealing with a most complex subject, the several Acts should be found to have been so scientifically drafted that a particular word always bears the same meaning. Neither can I derive any help from the many authorities quoted in argument, because hardly one of them touches on the meaning of the word "sale" in the 48th section, and I cannot find that any of them decides that "sale" or "sold" must have the same definite meaning in every Act in

(1) 11 Ch. Div. 284.

the code. The cases on ademption and conversion seem to me not to throw any light on the present one. A judgment as to the date from which conversion should operate—whether from the date of the contract or the happening of a particular event—is quite beside the question arising on the 48th section, and I may say this, that no matter when the conversion is effected, it results from the contract which provides for it. It is the contract which makes the conversion. It is the performance of the condition which fixes the date of its operation and the time from which the conversion takes place: *Re Isaacs* (1), judgment of Chitty J., at page 509.

It was argued that if the date of sale is to be fixed by reference to the agreements for sale, it involves several different dates for the sale of different parts of a property, because agreements are in practice not executed on the same day. I confess that this consideration does not cause me any embarrassment in the present case, because whether the agreements were executed on the same day or on different days the vendors were mortgagees during the whole period covered by their execution. When a case arises in which some sales have been agreed upon when the vendor was a mortgagee, and others agreed upon when he had ceased to be a mortgagee, the question will arise whether the vendor is entitled to a percentage on a portion of the purchase-money. It does not arise in this case, and I may say that if the vesting is to be taken as fixing the date of sale the same difficulty may arise, because all the vesting orders are not necessarily made on the same day.

I am satisfied that in the present case the sale was by vendors when they were mortgagees in possession, and that they are not entitled to the percentage.

RONAN L.J.:—

The expression "date of the sale" does not occur in the bonus code, and we have not been referred to any section in the Acts where it does occur. The expression "at the time of sale" occurs three times in sect. 99 of the Irish Land Act, 1903. Thus, sect. 99 (*b*): "Any mine or quarry which is being worked or developed by the vendor at the time of sale." In *Lyle's Estate* (1) the question arose as to the meaning of these words "time of sale." Wylie J.'s judgment is clear: "I have no doubt that, having regard to the different sections of the Land Purchase Acts and this particular section, and also to the forms and rules for carrying out sales, it means the time of the agreement for sale to be carried out under the Land Purchase Acts."

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(1) [1894] 3 Ch., at pp. 506–9.

During the argument, the Master of the Rolls and I called attention to sections in the Purchase Acts themselves (not rules only). I shall refer to the Act of 1885, as it is really the foundation of the modern purchase code. Sect. 10 of the Act of 1885 says: "In every case in which a holding is sold by the Land Commission to a tenant . . , also in every case in which a holding is sold by a landlord to a tenant, and it is agreed that such sale shall be carried into effect by a vesting order of the Land Commission, the Land Commission shall have jurisdiction," etc. Similar words occur in sect. 8, sect. 9, sub-s. 5, and sect. 14, sub-s. 2, of the Act of 1887, which clearly shows how the vesting order corresponds with a conveyance. Sect. 31, sub-s. 1, of the Act of 1896 says: "Where any land has been sold under the Land Purchase Acts . . . and an advance . . . is made . . . the sale of such land . . . shall be made discharged from all superior interests." Here "sold" plainly refers to the agreement for sale, and "sale shall be made" equally plainly refers to the completion by the vesting order. In ordinary legal language there is a common expression, "completion of the sale," "time for completion of sale," etc. Generally speaking, this means the conveyance and payment of the purchase-money. In Dart's Vendor and Purchaser there are separate chapters dealing with the effect of the contract on the rights of the parties, and with the effect of the conveyance on the rights of the parties. Such expressions as "carrying out a sale" and "completing a sale" necessarily imply the existence of a sale to be carried out or completed. "Time of sale" may mean the date of the commencement of the sale, or the date of the completion, or the whole period between the two, or any particular part of that period indicated in a particular provision, for sect. 24, sub-s. 1, of the Act of 1903 says: "In the case of the sale of an estate . . . so

(1) 41 I. L. T. R. 112.

soon as the holding is vested in the purchaser." This plainly means when this stage of the sale is reached. The first sentence in Williams' Vendors and Purchasers is an apt illustration of this: "The subject of the present treatise is the sale of real estate, or the formation and completion of contracts for the conveyance of land in consideration of a price in money." The marginal note is "sale defined." It consists of two parts—1, the contract; 2, the completion.

The question in this case is: What is meant by the term "sold by" in the sentence, "any estate sold by a mortgagee in possession"? (He is enabled to sell by the Act of 1896.) Does it refer (*a*) to the making of the contract, or (*b*) to some other act done by the vendor, or (*c*) to the completion of the sale by the vesting order, the act of the Land Commission? There is no doubt that in sales by the Land Judge, the date of the sales is the acceptance of the offer, and not the date of the conveyance.

The object of the Land Purchase Acts was to abolish as far as possible dual ownership, and to convert tenants into what I may call peasant proprietors, owners of the fee-simple of their holdings. The purchase of lands by the Land Commission or Congested Districts Board was simply for the purpose of enabling them to vest the lands in the tenants. The mode by which this had to be carried out was by bringing about a purchase by the tenant of the reversion in fee on his tenancy. For my present purpose, I assume the landlord was the owner of this reversion. The only difficulty was price. The landlord would always be willing to sell if the price was large enough; the tenant willing to buy if the price was small enough and he had the money; but each had to be satisfied with the price fixed before there could be a sale.

The statutes prior to 1903, with a view to inducing the tenant to offer a price which the landlord would accept, made provisions for lending the tenant the money on very advantageous terms, giving him a statutory title free of cost and other advantages. However, it was found that in a great number of cases the prices which the tenants offered in these circumstances would not be accepted by the landlords. Accordingly, "it became necessary" (in the words of the Lord Chief Baron) "to give landlords a premium to induce them to sell at prices which it was probable the tenants would accept." This was done by the Act of 1903, and this premium is the bonus. The object of the bonus is to induce the vendor in an agreement for sale to agree to a price which the purchaser will agree to pay. Once this is done and the price fixed, and a valid agreement for sale made, the object is attained. It is obvious that it is on the mind of the person who in fact fixes the price that the bonus is to operate as a motive, and therefore that, prima facie, the bonus is payable to the vendor in the agreement which fixes the price, and is the basis of a subsequently completed sale. The agreement is the basis of the jurisdiction; everything else is machinery for carrying it out. All this of course depends on the statutes. I now proceed to deal with them.

The present case raises a question of the construction of certain provisions of the Land Purchase Acts. There is a series of these Acts and provisions, and they are to be read together. But in reference to the present case, which mainly turns on the construction of sect. 48 of the Act of 1903 and of the Act of 1904, sect. 4 of the latter Act provides in addition that "the said Act of 1903 shall be construed and shall take effect from the date of its passing as if this Act had then formed part thereof." We must therefore construe the two Acts as directed, not as two Acts passed at different times; but it must always be remembered that sects. 2 and 3 of the Act of 1904 are subject to the provisions in sub-sects. 1 and 4 of s. 48 of the Act of 1903. In *Barton's Estate* (1) the Lord Chief Baron, dealing with sect. 48, says: "The solution of the question depends upon the construction of a section which is self-contained—that is, one the construction of which cannot be helped by reference to other parts of the Act." In my opinion, in the present case sects. 2 and 3 of the Act of 1904 must be carefully considered and applied as directed by sect. 4, and when this is done I think it clear that they materially affect the direct question with which we have to deal. The Lord Chief Baron continues: "In the commencement of the section we have that which we usually have not in an isolated section—the reason of the Legislature for passing it. Its object was to induce sales under, or, in the words of the

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(1) [1910] 1 I. R. 100.

Act, 'for the purpose of aiding the sale of estates under this Act.' . . . It seemed good to the Legislature to encourage such sales, and it became necessary to give landlords a premium to induce them to sell at prices at which it was probable that tenants would purchase." He then points out that this is done by the provision in sect. 48: "The Land Commission may [which in this context means shall] . . . pay to the vendor of each estate sold a sum calculated," &c. But it is also done by sect. 2 of the Act of 1904: "The percentage . . . may [which in my opinion here equally means shall], subject to the enactments contained in the proviso to sub-s. 1 and sect. 4 thereof, be paid to any vendor other than the Congested Districts Board, whether such vendor is a person entitled to a beneficial interest in the land sold or is a trustee or other person not so entitled." Having regard to sect. 4 of the Act of 1904, this exceptional statement of the reason of the Legislature applies equally to the Act of 1904. It is, in my opinion, of vital importance in the present case. It is in the nature of a special preamble to part of the Act of 1903 and the Act of 1904. Modern statutes, as a rule, have no preamble, so that the introduction of what I shall call a preamble in this case is not only unusual, as being annexed to a section, but any preamble in any modern statute must be regarded as something exceptional and deserving of special attention.

I shall now quote three authorities as to the effect to be given to the preamble by a Court called on to construe a statute:—"The rehearsal or preamble of a statute is a good means to find out the meaning of the statute, and, as it were, a key to open the understanding thereof": Co. Litt. 79*a*; 4 Inst. 330. The preamble of a statute is to be considered, what Dyer termed, "a key to open the minds of the makers of the Act, and the mischiefs which they intended to redress": *Stowell* v. *Lord Zouch* (1). In *Commissioners for Special Purposes of Income Tax* v. *Pemsel* (2), Lord Halsbury C. says:—"My Lords, to quote from the language of Tindal C.J., when delivering the opinion of the Judges in the *Sussex Peerage Case* (3): 'The only rule for the construction of Acts of Parliament is that they should be construed according to the intent of the Parliament which passed

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(1) Plow. 353, at p. 369.
(2) [1891] A. C. 531, at pp. 542-3.
(3) 11 Cl. & F., at p. 143.

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the Act. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do in such cases best declare the intention of the lawgiver. But if any doubt arises from the terms employed by the Legislature, it has always been held a safe means of collecting the intention, to call in aid the ground and cause of making the statute, and to have recourse to the preamble, which, according to Dyer C.J. (*Stowell* v. *Lord Zouch*) (1), is a key to open the minds of the makers of the Act, and the mischiefs which they are intended to redress.' " In my opinion the preamble in the present case is the ruling principle to apply to every question arising on the bonus code where the operative words are at all uncertain or ambiguous.

In my opinion a careful examination of the statutes establishes the following propositions:—1, The bonus is an inducement to vendor when fixing the price; 2, it is always paid to the vendor (either as trustee or otherwise) who does so, except (*a*) sales by Land Judge, (*b*) estate insolvent as to income; and except 3, where such vendor is an incumbrancer only when he does so; 4, in which case there is no bonus; 5, in sales by the Land Judge the money is paid into Court; 6, where the party to the proceeding, who has practically the fixing of the price, is the owner there is a bonus; 7, where he is an incumbrancer there is no bonus. I infer from this that the time when he fixes the price is the time at which the status of the vendor is to be determined.

The bonus is a percentage on the gross purchase-money. If the vendor is entitled to any part of the purchase-money, he gets the same bonus as if he were entitled to the whole. Thus, vendor A has an unincumbered estate in fee worth £10,000. Vendor B has an incumbered estate gross value £50,000, but mortgaged to the extent of £49,000, i.e., his beneficial interest is £1,000. B's bonus is five times greater than A's. Roughly speaking, the amount varies with the quantity of the land the vendor can dispose of and make available for the purposes of the Act. The amount of percentage depends on the dates of the agreements for purchase: Act of 1903, sect. 48, sub-s. 3; Act of 1909, sect. 6. *Domvile's Estate* (1) and *M'Namara's Estate* (2) show that in cases of direct sales to tenants the bonus is separately calculated in respect of the part of the purchase-money comprised in each tenant's agreement according to its date. The purchase-money of the estate is, of course, the total of those in the agreements. The total bonus is the total of the several bonuses in respect of each agreement. This section once for all puts an end to all the curious suggestions in the argument, such as that there is no agreement for the sale of an estate where the lands are sold by a landlord to more than one tenant, and that consequently there is no date of the agreement. (Apparently it would follow that there is no purchase-money either.) The section is vital as showing how the bonus depends on the dates of the fixing by the vendor of the price of each part of the total purchase-money.

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(1) Plow. 353, at p. 369.

Taking sect. 48 and the Act of 1904 together as the bonus code, to which we must add the Act of 1909, sects. 6 and 39, the general provisions, subject to specific exceptions, are:—1. The bonus is payable in respect of every estate sold under the Act, whether the sale of the estate is (*a*) to one, or (*b*) to several tenants, or (*c*) to the Land Commission, or (*d*) to the Congested Districts Board, and in (*c*) and (*d*) whether the land is tenanted or not (Act, 1904, sect. 1). 2. It is in every case payable to the vendor, with two exceptions. 3. When the bonus is paid to the vendor he either takes it for his own use, or holds it on the trusts affecting the purchase-money. 4. The exceptions to 2 are the cases where it is added to the purchase-money. This is in substance the same thing as the case under 4, where he holds it on trusts of purchase-money, except that adding it to the purchase-money deprives him of the opportunity of stealing it. 5. The bonus is payable whether the provisions of sect. 17 of the Act of 1903 are availed of or not. The law is not altered by the fact that in practice they are extensively availed of. This is very important. 6. Sales under the Act are of two classes—(*a*) Sales under an agreement between two voluntary contracting parties. This is a case of this class. (*b*) Sales by the Land Judge under an absolute order for sale. These are confined, so far as the Act of 1903 is concerned, to sales to the Land Commission or to the Congested

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(1) [1910] 1 I. R. 334, 342.

(2) 45 I. L. T. R. 276.

Districts Board for the purpose of resale to tenants. They are specially dealt with in the Act: see sect. 7 and sect. 79.

The lands in this case were never the subject of Landed Estates Court proceedings, and, therefore, sect. 48, sub-sect. 4 (except the final clause), does not apply to the present case; but its provisions throw a very clear light on the main object of the bonus, i.e., its operation on the mind of the person fixing the price. When the Land Commission or the Congested Districts Board offer to purchase an estate in the Land Judge's Court, for the purpose of resale to tenants, they naturally wish to get it at as low a price as possible. If the estate is solvent as to capital, the owner has the contrary interest. Accordingly, he is allowed in such a case to have a deciding voice in the matter of the acceptance of an offer. In such a case the bonus would directly induce him to consent to a lower price. Here he gets the bonus, as it is added to the purchase-money, which is his if the estate is solvent. On the other hand, if the estate is insolvent as to capital, he has no interest in the price, he has no voice in fixing it, and he gets no bonus. There is none.

As to the other limb of the section, if the absolute order is in force at the date of the Act, his position then, if the estate is insolvent as to capital, is that it can, and may, be sold at a price in the fixing of which the owner has no voice. Consequently, there is no bonus. I take another case. A is owner of the estate, which cannot fetch more than £10,000. B is a mortgagee, to whom £12,000 is due for principal and interest. He is for all practical purposes the owner of the estate. He has the same interest in the price as the owner in the case of the solvent estate. There is no doubt that he would be heard by the Land Judge just as attentively as the owner in the other case, and be influenced by the bonus in the same way (see passage from judgment of Flanagan J. quoted by FitzGibbon L.J. in judgment in *Holmes' Estate* (1)); but notwithstanding this, there is no bonus in his case. Why? Because the advantages held out by the purchase code were for the benefit of tenants and landlords, and not of incumbrancers. The fact that the clause as to sales by mortgagees in possession, which is a general clause, having no connexion with

(1) [1907] 1 I. R. 139.

the subject of sect. 48, sub-sect. 4, immediately follows these clauses, seems to me very significant. This is shown still more forcibly by sect. 31 of the Act of 1909. In *Holmes' Estate* (1) the owner had also the first charge on the lands. The estate was so insolvent that the purchase-money was not sufficient to pay the first charge. In the circumstances, Ross J. and the Court of Appeal (by a majority) held that the owner had a direct interest as chargeant, and that though, if he was not also owner, this would not take the case out of the exception, still, in fact, the consent of the owner was necessary, and that the bonus was payable. The section was passed to overrule this decision, which it did by providing that if the consent of the owner was only required in his capacity as incumbrancer, it should not take the case out of the exception. There is underlying the whole sub-section, including the final clause, the intention that there should be no bonus where the only persons it would benefit were mortgagees, even though it would influence them in favour of a lower price.

In the case of a mortgagee in possession, there are two persons entitled to sell under the Purchase Acts—1, the owner of the mortgage; 2, the owner of the equity of redemption. Probably one object of the final clause in sect. 48, sub-s. 4, was to prevent a mortgagee from depriving the owner of the power of selling and earning the bonus for himself. In such a case, if the estate was solvent as to income, he would be entitled to receive the entire bonus for his own benefit, though some of the mortgagees were left unpaid.

The general result is that where the price is fixed either directly, as in the case of agreements, or indirectly, as in the case of the sales of solvent estates by the Land Judge by an owner landlord, there is a bonus. But where it is fixed by an incumbrancer either directly by agreement, as in the case of a mortgagee in possession, or indirectly, as in the case of a sale by the Land Judge of an insolvent estate by an incumbrancer entitled to the entire purchase-money, there is no bonus. This consideration, coupled with the preamble, really seems to me almost conclusive of the present case. There is no bonus in the case of sales by the Congested Districts Board. They are a public body whose duty it is to sell to tenants if possible. The case of sales by the Land Commission is similar; they are not expressly excepted, but clearly are by implication, as they are the persons to pay the bonus. In the case of the Land Judge, he is really the vendor, and the bonus is when payable added to the purchase-money which is lodged in court. Mortgagees could only benefit by it if the estate was insolvent, and there is no bonus in such a case. If solvent, as already pointed out, the owner who gets it has control of the price. All these considerations demonstrate the dominant intention of the Acts, viz., that the bonus is determined by and follows the fixing of the price, and that dominant intention must govern the construction of any ambiguous expressions relating thereto. The provisions as to when the vendor can retain the bonus for his own use, although his estate is insolvent as to capital and there are unpaid mortgagees, throw further light on the motive for the bonus. The bonus is for aiding sales—1. How? By inducing the vendor to accept a price which the purchaser is willing to pay. 2. At what time is it intended to operate and have effect? At the time the price is agreed on and fixed. 3. When is this? At the date of the agreement in cases of voluntary sale; when the Judge accepts the bid or offer in the cases of sales by the Land Judge. 4. When is there a bonus? When the price is fixed directly or indirectly by an owner, either directly by agreement or indirectly by consent to acceptance of price by landlord. 5. When is there no bonus? When the price is fixed directly or indirectly by an incumbrancer or by the Land Judge independently of the owner's consent.

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(1) [1907] 1 I. R. 139.

The landlord who can sell to the tenant under the Act of 1870 is defined by sects. 26 and 31 of that Act. These sections are extended to the later code by sect. 34 of the Act of 1887, and sect. 42 of the Act of 1896. Either the tenant in fee-simple in the case of freeholds, or the absolute owner of the entire interest in the case of leases held for lives or years renewable for ever, "or for a term of years of which not less than sixty are unexpired at the time of the sale being made," can sell. These persons are "absolute owners"; tenants for life of these estates are "limited owners," and can sell; corporations, trustees for charities, and certain commissioners, if their estate is a lease for an unexpired residue of not less than thirty-one years, are "other limited owners." Omitting the last, we may say that to constitute a landlord he must be either absolute owner or tenant for life of an estate ranging from the fee-simple to an existing term of sixty years. According to sect. 34 of the Act of 1887, the word "landlord" shall, for the purposes of sales to tenants, "include any person entitled to an estate as a trustee for sale, and any limited owner as defined by sect. 33 of the Landlord and Tenant (Ireland) Act, 1870." In the Act of 1896 "'limited owner' means a limited owner within the meaning of sect. 26 of the Landlord and Tenant (Ireland) Act, 1870, and includes any persons having the powers of a tenant for life under the Settled Land Acts." Sect. 3 of the Act of 1904 does not follow either of these definitions, but says: "Where the vendor is a tenant for life, or a person having the powers of a tenant for life under the Settled Land Acts," he shall take the bonus for his own use. Under sect. 2, in every other case he shall hold it on the trusts of the purchase-money. It is plain that there are many persons entitled to sell under the Purchase Acts who are not within sect. 3, e.g., trustees for sale, trustees for charities, mortgagees in possession, etc. The power to make a valid agreement for sale is not the test of the right to receive the bonus for "his own use."

Section 58 of the Settled Land Act of 1882 says: "Each person as follows shall, when the estate or interest of each of them is in possession, have the powers of a tenant for life." Then comes a list, commencing with—1, a tenant in tail; 2, a tenant in fee-simple, with an executory limitation over on failure of his issue, or in any other event, and diminishing down to 9, a person entitled to the income of land under a trust for him for his own or any other life, or until the sale of the land, or bankruptcy. When is it to be ascertained whether the vendor is "a tenant for life," or belonging to one of these nine classes? Surely it must be when he exercises the powers of a tenant for life by making the agreement of sale, and thereby fixing a price and bonus, and giving the Commission the power to vest the fee in the tenant. He must then prove his title to sell in the case I have put of sect. 17 not being availed of. Under sect. 2 of the Act of 1904 the vendor may be—(*a*) a person entitled to a beneficial interest in the land sold, (*b*) a trustee, or (*c*) other person not so entitled. His right to retain the bonus for his own use under sect. 3 is not determined by the extent of his estate, but depends solely on his being a tenant for life, or a person having the powers of a tenant for life under the Settled Land Acts.

The importance of the matter is that the Act makes the right to the bonus depend on the exercise of the powers of disposition, not on the extent of ownership. The persons having the powers of tenants for life range from tenants in tail in possession, who are practically owners in fee, to persons whose interest is extremely small. They all get the same bonus, because they all have the same power of disposition. Why persons who have the same power of disposition are excluded from this I cannot conceive, except in the case of the mortgagee in possession. Possibly the other limited owners under the 26th section of the Act of 1870 were overlooked, but it is certainly curious that a tenant for life in an estate for years renewable for ever should be excluded, and a tenant for life whose estate is determinable on sale of the land, bankruptcy, or any other event (Settled Land Act, 1882, sect. 58 (ix)) should be included. It is still more curious that a tenant in fee should be excluded from this sub-section. However, it seems plain that "the persons having the powers of a tenant for life" under sect. 2 are those specified in sect. 58 only. A tenant in fee is neither a tenant for life nor one of these persons. The Settled Land Act does not deal with tenants in fee absolute. The land is not then settled land. If this is so in the case of an estate solvent as to income, but insolvent as to capital, the result would be that a tenant for life, or the person in sect. 58, sub-s. 9, would get the bonus, and the tenant in fee would not. This was, of course, never intended, but it shows the danger of referential drafting. I do not think that this point has ever been taken, as all the cases seem to assume that a tenant in fee vendor is entitled to the bonus. The omission of the tenant in fee is the strongest proof that what the Legislature was dealing with was power of disposition, not estate, and it consequently confined sect. 3, sub-s. 1, of the Act of 1904 to persons having powers of disposition greater than that given by their estates. Hence the omission.

I now take a case in which sect. 17 of the Act of 1903 is not availed of. An agreement to sell is the basis of the jurisdiction. A valid agreement must be by a person having power to bind the fee for the purpose of the Purchase Acts. 1. He must be an absolute or limited owner, or a mortgagee in possession with power of sale. 2. He must also be a landlord. Then the Land Commission Court must determine the legal title of the landlord to sell before they act on the agreement. This may have been as tenant in fee or as tenant for life or as trustee for sale only. Assume he proves this title, this would enable them to proceed and make the vesting order. His contract bound the fee in fact. This was the vital matter for this purpose. What is the effect of the contract? As Lord O'Hagan says in *Shaw* v. *Foster* (1): "By the contract of sale the vendor . . . disposes of his right over the estate." His power to sell is gone. But for the purposes of the bonus he has by fixing the price fixed the amount of the bonus, and he has fixed the price binding on everyone, and proved his title to do so. His title may be a Land Judge's conveyance to himself a week before the agreement. What else does the statute require to make the bonus payable? In the simplest terms it requires the vesting order. Nothing else. Therefore the bonus is payable if there is an agreement by a competent vendor and a subsequent vesting order under that agreement. The bonus code is not concerned with the machinery and procedure of the Land Commission in and prior to the making of the order.

In the case of estates which have never been in the Land Judge's Court, there is to be a bonus in every case (except where the sale is by a mortgagee in possession). We may substitute for the crucial words, "lands sold by a mortgagee in possession with a power of sale," the words "where the vendor is a mortgagee in possession with power of sale". This will make the clause fit in with the rest of the section. In every case but one it is to be paid to the vendor. Who is he? Presumably the person who sells. There is only one bonus and one vendor in every case. Who is he? This must be ascertained from the statute alone.

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(1) L. R. 5 H. of L. 321, at p. 349.

He is the person to be paid the bonus when it is not paid into Court. How is he to be ascertained, and when? His status must be determined once for all. His title to the bonus becomes absolute on the vesting order being made. That decides nothing as to the vendor's title or the vendor. He must therefore have had a contingent title before, which the vesting order makes absolute. He must be an ascertainable person at the date of the vesting order. Someone was the vendor at that time who had a conditional right to the bonus. Can this be anyone but the vendor who made the agreement, whether he was tenant for life or tenant in fee, or a mortgagee in possession with power of sale?

There is no definition of vendor in the Acts. What is the ordinary meaning of vendor in the common case of an agreement for sale completed by conveyance? Is it the person who made the contract or the person who makes the conveyance or is entitled to make it? Surely the former. In every book on Vendor and Purchaser there is a chapter or section dealing with the effect of the death of the vendor before completion. "The vendor is entitled to the purchase-money. The heir-at-law of the vendor is trustee of the lands for the purchaser." Such statements are familiar to every law student. In the agreement prescribed under these very Acts the landlord selling to a tenant is described as "the vendor." He is so described in the agreements we are dealing with in this case. The ordinary case is the same. The vendor has nothing to say to the making of the vesting order. It is analogous to the making of the conveyance by the Land Judge. What Act can possibly be referred to as making anyone the vendor except the maker of the agreement? He unquestionably is the vendor then. The vesting order is the performance of the condition of his contract and also its completion. The agreement is the basis of the jurisdiction; it binds the land and everyone by the operation of the statute.

Two things are clear:—1. There is only one bonus in respect of each estate. 2. Except in the one case it is to be paid to the vendor; therefore there is only one vendor. He must be an ascertainable person in every case. If a tenant in fee makes the agreement, the land is bound by it. If a tenant for life makes the agreement, the land is bound. If a trustee for sale makes the agreement, the land is bound. In none of these cases has anyone else any power to sell the land. The original vendor may die, or his interest may determine, or he may assign it to another; but in all these cases the land continues bound by the original contract for sale. A tenant for life makes agreement to sell in 1904. The estate is declared in 1906. The lands are vested in the tenants in 1908. There can be no doubt as to his claim to the bonus. He was entitled in 1904 to make the agreement. He was equally entitled to convey the lands in 1908. He had to prove his title to the bonus, i.e., title to sell. Was it title in 1904, or title in 1908, or both? There seems to me to be a simple test. Assume he died in 1904, the day after he made the disposition. His power of disposition determined with his estate at his death. But is there any doubt that his executor would be entitled to the bonus? Would he be in a worse position if he survived? If so, it was only his title as to sale at the date of the agreement he had to prove, though his right to the bonus was contingent on the sale being effected. No one can dispute the right of his executors to the bonus. His contingent right passed to them on his death, and the vesting order made it absolute.

The proposition may be stated thus: where "a limited owner" A agrees to sell under the Act in the usual form he acquires a right to the bonus contingent on the estate being sold under the Act in pursuance of the agreement; and, therefore the title he has to prove is title at the date of the agreement. The same thing would appear to apply to the absolute owner A. Assume in that case agreement in 1904 by him; sale by him of his estate to B in 1905; vesting in 1908, B would be entitled to purchase-money. As to bonus, it would be a question of construction whether his conveyance from A included A's title to bonus. If A did not assign his contingent right to the bonus to B, it remained A's property. B could only claim through A, just as in the case of the limited owner A's executors claimed through A. For the purposes of the bonus the original vendor in the agreement is "the vendor" so long as that agreement is the basis of the sale. It cannot be varied except by consent of both parties. One thing is clear from the judgment of Wylie J. in

Lyle's Estate (1), and that is that the vendor in the agreement is the vendor under the Act.

The question in this case is one of title. The question of the proviso in sect. 48 as to cases where the vendor's estate is insolvent as to income by reason of incumbrances, does not arise; but as it was relied on during the argument, I shall only say that the cases of the absolute and limited owner I have just stated seem to me conclusive that the period for fixing this must be the date of the agreement. How can it be any other date where the tenant for life dies or the absolute owner assigns his estate the day after the agreement?

The only case I have heard of in which the bonus was paid to a person who was not the vendor who fixed the price is *Brew's Estate* (2). In that case A, vendor in agreement, was dealt with as owner under sect. 17. On investigation of title it was proved that B was owner, and that A had no title. Wylie J. says, A "as actual vendor now claims the bonus," and B "as the real owner and the only person who had power to sell also claims it." There was no attempt to show that any relation of agency ever existed between A and B. Legal fictions were allowed in the early days of the law, and some dating from early periods have been allowed to survive. The time has passed, in my opinion, for Courts to decide on the basis of facts which are known not to exist. As Lord Justice James forcibly put it, "No Court has the right to say the thing which is not." Wylie J. decided the case on the ground that the vendor should be treated as B's agent for the purposes of the sale. "Qui facit per alium facit per se." Therefore one would think he decided that B was really the vendor acting by his agent. In my opinion, he had no right to decide the case on any but the true facts, viz., that A was "the actual vendor," as he himself says.

The statute unequivocally provides for the case. The Act of 1904, sect. 2, says the bonus "may (shall) . . . be paid to any vendor . . . whether such vendor is a person entitled to a beneficial interest in the land sold or is a trustee or other person not so entitled, and, save as hereinafter provided, shall be held by him on the trusts affecting the purchase-money." A clearly was an "other

(1) 41 I. L. T. R. 112.

(2) [1912] 1 I. R. 22.

person not so entitled." If the estate was solvent, B would then have got it. If it was insolvent, he would not. The decision may have been right on the facts, but I do not think that Wylie J. was justified in, in effect, adding a section to the Act, saying that in such a case as this "the person having the power to sell shall be deemed to be the vendor for the purposes of the bonus." The Legislature alone can do this. At the same time, the case is very important from this statement of Wylie J.:—"Though a person may sell land under the Land Purchase Acts with the utmost bona fides and the strongest prima facie evidence of title, he cannot be entitled to the bonus as a vendor if at the time of sale he had no sufficient interest in the land to give him a power to sell; and I think in such a case the bonus must be paid to the person who is eventually proved to be the person who had the power to sell." There can be no doubt that "sell" here means make the agreement for sale, "and time of sale" means its date. It is assumed that the person to whom the bonus was paid in this case was a person who would have been entitled to the bonus if he had been the vendor.

I do not think it necessary to say anything further as to the 17th section, except that it is obvious that it cannot create a contingent right to the bonus where none would otherwise exist, and that there are cases where it should not be availed of, e.g., where the vendor's title consisted of a Land Judge's conveyance to the vendor immediately before the agreement. Lord Justice O'Connor will deal with the authorities.

For these reasons I agree with the Lord Chief Justice and the Master of the Rolls.

O'Connor L.J.:—

The respondent, as mortgagee in possession, entered into agreements, in the year 1907, for the sale of the estate to the tenants under the Purchase of Land (Ireland) Acts. During the course of the proceedings, namely, in the year 1914, the title of the owner of the equity of redemption became barred by the Statute of Limitations. The sale was completed in 1919. The respondent now contends that the sale is not a sale by a mortgagee in possession, but a sale by an owner in fee, and that

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he is therefore entitled to the bonus. I am of opinion that to award the bonus to the respondent is contrary to the spirit and intention of the Act creating the bonus (sect. 48 of the Irish Land Act, 1903) as well as to its letter.

The keynote to the section is to be found in the first line of it: "For the purpose of aiding the sale of estates under this Act." Ross J. indicated this very clearly in *Barton's Estate* (1), at p. 208, when he said: "The owner is to have the stimulus of the bonus so long as he has a voice in deciding whether the estate is to be sold or not. If the estate is solvent, he has a right to be heard up to the time when the sale takes place, and the bonus is given to encourage him to sell. If the estate is insolvent at the time of the sale, he has no right to be heard at all, and he does not get the bonus." That case went to the Court of Appeal (2), and the reasons of the learned Judge were adopted by all the members of the Court of Appeal. The Master of the Rolls said: "I am clearly of opinion that the order of Mr. Justice Ross can be upheld, and should be upheld, on the grounds stated in his judgment." Palles C.B. said: "I concur, for the reasons succinctly stated in the judgment of Mr. Justice Ross . . . I agree with every word of it." Holmes L.J. said: "I concur in the judgment of the Court for the reasons stated by Mr. Justice Ross." The decision in that case turned upon the construction of sect. 48, sub-s. 4, the sub-section which we have now to construe, though not, indeed, the limb of it under consideration; and of course the reasoning of Mr. Justice Ross, in the language I have quoted, goes to the very root and origin of the whole section itself. The meaning of Ross J. and of the Appeal Judges seems to me quite unmistakable: it is this, that the word "sale," in the expression, "for the purpose of aiding the sale," means "agreement for sale." Action is stimulated by that which precedes it, not by that which follows it; the mill-wheel does not grind with the water that is past. The State grant is provided for the purpose of inducing certain limited classes of owners to come to terms with their tenants.

The matter does not rest there, so far as authority is concerned. In *Thomson's Estate* (3) it was conceded by counsel, and taken by

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(1) [1909] 1 I. R., at p. 208.

(2) [1910] 1 I. R. 100.

(3) [1912] 1 I. R. 466, note.

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the Court, that the date of the agreements for sale is the crucial date; and I find, from the note in the Registrar's book, that the Lord Chancellor said: "Both sides agree that the crucial time is the date in August when the agreement for sale was made"; Holmes L.J. said: "At what particular time are we to ascertain that the estate is so incumbered? It has been laid down in one case that it is the date of the agreement for sale. I don't see what other date we could look at."

In *Bandon's Estate* (1) Wylie J., at p. 230, says that the date of ascertainment is the date of the sale, which he construes as the date of the agreements, on the ground that "the bonus is expressly given as an aid to the sale."

In *Roberts' Estate* (2) the date of the sale throughout the report obviously means the date of the agreements, and no other date—a construction put beyond all doubt by Holmes L.J. in his judgment (at p. 277). In *Nugent's Estate* (3), in the statement of facts of the case in the report and in the argument of counsel, the date of the sale obviously means the date of the agreement for sale.

I have said that, in the express words of the section, according to the reading of it, which I share with all the Judges who have previously discussed it, the State grant is given to induce owners of estates to come to terms with their tenants, but it is not given to all owners or in respect of all estates. In the clearest possible fashion it is withheld from, amongst others, mortgagees in possession, the object being, of course, to prevent the mortgagee making a profit out of his mortgage. In face of this prohibition, am I to award the State inducement to a mortgagee who, as such, entered into agreements for sale merely because, by the accident of things, the proceedings have been so delayed that the title of the owner of the equity of redemption has become barred by the Statute of Limitations? To do so, in my opinion, is a violation of the intent and meaning of the section.

I hold the proposition that the crucial date to determine whether the bonus is payable and what is its destination is the date of the agreement for sale. This is confirmed by sub-sect. 1, which provides (inter alia) that where an estate is so incumbered that the vendor is not entitled to receive for his own use any part of the rents or profits thereof, the bonus shall be added to the purchase-money, and shall not be paid to the vendor. Surely, it is manifest that the only time it can be ascertained whether or not the vendor is entitled to receive for his own use any part of the rents or profits is the time when the agreements are entered into, for after that his rents and profits disappear, being transmuted into interest on the purchase-money.

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(1) [1907] 1 I. R. 226.

(2) [1908] 1 I. R. 222.

(3) [1912] 2 I. R. 488.

An objection has been made that difficulties will occur where part of the estate is sold at one time and part at another. This is no real difficulty. The date of sale in such a case, I should think, would be the date of the execution of the last agreement in the series all of which ultimately come to form the "estate"; and the solvency of the estate as a whole, as to capital and income, is easily ascertainable at any given moment, though, perhaps, evidence by valuation of an unsold part may be necessary. This alleged difficulty, I should imagine, occurs frequently enough where an incumbrance covers several estates, only one or some of which are to be sold.

An argument has been based on sect. 17, which gives power to the Land Commission to deal with a person six years in possession as the owner. It is said that curious results would follow if such a person were afterwards found not to be the owner at all; for that on my construction the real owner of a solvent estate would not get the bonus. I think no such result would follow. The section expressly says that the prima facie (that is, the six years in possession) owner shall not be deemed to be the owner for the purpose of the distribution of the purchase-money or the payment of the bonus. In the exceptional case suggested, it seems to me that the prima facie owner would be treated as the statutory agent of the real owner for the purpose of the inception of the proceedings, and that the real owner would get the bonus as well as the purchase-money.

Since writing this I have read Wylie J.'s judgment in *Brew's Estate* (1), in which he takes precisely the same view as to sect. 17.

The object of the section was clearly to prevent a mortgagee making a profit out of his mortgage. By yielding to the respondent's contention here, the mortgagee will make a profit out of his mortgage. We shall, further, enable all mortgagees in possession selling to buy up the equity of redemption for what would be a small sum, and so to get a State benefit which was never intended for them. For these reasons I think Wylie J.'s opinion, as distinguished from his order, was correct, and that the appeal should be allowed.

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(1) [1912] 1 I. R. 22.

Solicitor for the appellant: *The Treasury Solicitor.*
Solicitors for the respondents: *F. & C. Downing.*

C. L.

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BRADY AND OTHERS *v.* THE IRISH LAND COMMISSION.

(1919. No. 737.)

Insurance, Policy of—Fire Policy required by Irish Land Commission on sale under Land Purchase Acts—What interests covered—Subsequent conveyance by purchaser—Rights of grantee with respect to insurance moneys.

On the resale of his demesne to the owner of an estate under the Irish Land Act, 1903 (3 Edw. 7, c. 37), sect. 3, he, in compliance with the requirements of the Irish Land Commission, effected a policy of insurance against fire on the buildings on the lands by a one-premium policy in the name of the Land Commission covering the entire period of sixty-eight and a half years, during which the land-purchase annuity would be payable. One of the conditions of the policy provided that the insurance company should not require the Land Commission to show at any time that its interest in the property was commensurate with the loss which might have accrued, and the company thereby undertook to make good to the Land Commission such loss irrespective of the interests involved. The owner subsequently conveyed the lands to the plaintiffs. The buildings were destroyed by fire.

The Land Commission having been paid the insurance moneys: *Held*, that the plaintiffs were entitled to have the moneys applied either for the reinstatement of the premises or towards the redemption of the annuity.

The inchoate interest which each successive owner of the lands, having a right to redeem the land purchase annuity, has in the policy distinguishes the case from those in which successors in title have been held to have no interest in policies effected by their predecessors.

ACTION for a declaration that the defendants were trustees of a policy of insurance effected in the name of the defendants with the North British and Mercantile Insurance Company, and insuring the plaintiff's premises, Bailieborough Castle, County Cavan, against damage by fire in the sum of £1,540, and of the policy moneys secured thereby, and that the defendants were bound to call for and get in the insurance moneys payable under the said policy, and apply the same in paying off the unpaid purchase instalments due in respect of said premises, or to have them laid out towards reinstating the premises.

The demesne of Bailieborough Castle, in the County of Cavan, and certain tenanted lands were in the ownership of Mr. William Cochrane, who in the year 1910 received a proposal from the Land Commission to purchase from him the entire estate for the sum of £5,757, of which £5,212 was to be advanced from the Land Purchase Fund, and the balance, £545, was to be lodged in cash with the Land Commission by the vendor. This proposal contained a proviso that the vendor should enter into an undertaking to repurchase the demesne for the sum of £2,464, of which £1,919 was to be advanced by the Land Commission, and the balance, £545 (the sum already mentioned), was to be lodged in cash by the vendor, and to effect a policy of insurance against damage by fire on the dwelling-house and offices in the form and with a company approved of by the Land Commission for the sum of £1,540 in the name of the Commission for a term of sixty-eight and a half years, with all premiums fully paid up and compounded for in advance, and to enter into such contract as the Land Commission might require, to observe the terms of the policy, and to constitute the Commission his attorneys for the purpose of obtaining payment of any moneys which might become payable on foot of the policy, and to lodge it, together with the power of attorney, with the Land Commission.

The repurchase by Cochrane was carried out in the ordinary course of the Land Commission. The demesne was reconveyed to him by means of a vesting order, subject to and charged with an annuity of £62 7*s.* 4*d.*, payable to the Land Commission from the 1st June, 1911, until the advance of £1,919, with interest, was paid off at the end of sixty-eight and a half years. Contemporaneously a policy of fire insurance was effected in the name of the Land Commission as the assured with the North British and Mercantile Insurance Co., insuring the castle for £1,200 and the remaining buildings for £340 against loss by or damage by fire, for the whole period covered by the annuity, viz., sixty-eight and a half years, for a single premium of £35 17*s.* 8*d.* The policy contained the usual condition as to assignment. Certain memoranda were endorsed on the policy, No. 3 of which was as follows:—"The corporation shall not be at liberty to require the Land Commission to show at any time that its interest in the premises or property above described amounts to or is commensurate with the extent of the loss or injury which may at any time have accrued, and the corporation hereby undertakes to pay or make good to the Land Commission all such loss or injury to an amount not exceeding the sum insured by this policy irrespective of the interests involved."

The 5th condition of the policy was as follows:—"This policy shall cease to be in force as to any property hereby insured upon the interest of the insured therein passing from him otherwise than by will or operation of law, unless notice thereof be given to the corporation, and the insurance be declared to be continued to his successor in interest by a memorandum made on the policy by or on behalf of the corporation, and the expression 'insured' herein shall include every successor in interest to whom the insurance be so declared to be or is otherwise continued."

There was also a contemporaneous indenture made between Cochrane, the purchaser, and the Land Commission, which recited the purchase, and that it was one of the terms of the advance of the purchase-money that the purchaser should effect a policy of insurance against fire in the mansion-house and offices in the sum of £1,540 in the name of the Commission; such policy to cover the term of sixty-eight and a half years from the date thereof by the payment of one premium. It then recited that the policy had been effected, and by the indenture the purchaser covenanted with the Land Commission not to do any act which would avoid the policy, and appointed the Commission, their agents and servants, to be the true and lawful attorneys of the purchaser and his successors in title in his and their name and names, and in his and their behalf on every occasion on which the premises should be damaged by fire, to enter upon and take possession of the insured premises, and to do all things necessary and proper for obtaining payment of any moneys which should become payable on foot of the policy, and for the observance and performance of the several conditions of the policy. This document was also attached to and incorporated with the policy.

On the 15th July, 1915, Cochrane assigned all his estate and interest in the premises to the plaintiffs. The castle was burned down on the 21st November, 1918. On the 4th December, 1918, this fact was notified to the Land Commission by one of the plaintiffs, and the insurance company, claiming to be entitled to certain rights of subrogation, ultimately paid to the Land Commission £1,200 on foot of the policy.

Serjeant Sullivan K.C. (with him *S. L. Brown K.C.*, *Conner K.C.*, and *Tobias*), for the plaintiffs:—

The question at issue in the case is whether, when a policy of insurance is taken out by a purchaser in the name of the Land Commission on the loss happening, are the Land Commission bound to get in the money, and what right the purchaser has to control the application of the money? The policy was paid for by Cochrane, and taken out in the name of the Land Commission. It was for the mutual benefit of both, and the plaintiffs are entitled to the relief sought.

FitzGibbon K.C. and *McCarthy Mahony* (with them *W. E. Wylie K.C.*), for the defendants:—

We say that the plaintiffs' statement of claim discloses no ground of action, inasmuch as it alleges no title in them to the policy. It alleges a title in Cochrane; but even if Cochrane had any benefit under it, that was not assignable for three reasons: 1, a contract for sale is a personal contract; 2, fire policies are not assignable; 3, the benefit of a fire policy does not pass on the transfer of lands.

The policy belongs to the Land Commission alone. Cochrane had no right to it. His deed, dated April 28th, 1910, stating that he will do all things necessary to enable them to recover the moneys shows that the policy is taken out in our name, and is simply an insurance of our security: *Raynor* v. *Preston* (1). This is shown by the third memorandum providing that it is not necessary to show the extent of our interest in the land. The policy is a non-interest policy, and the Gambling Act of 1774 does not apply: *Keith* v. *Marine Insurance Co.* (2). The action is wholly unsustainable. [They also cited *Poole* v. *Adams* (3);

(1) 18 Ch. D. 1. (2) 10 L. R. Ir. 51. (3) 12 W. R. 683.

Castellain v. *Preston* (1); *Mildmay* v. *Folgan* (2); *Payne* v. *Meller* (3); *Darren* v. *Tippets* (4); *West of England Co.* v. *Isaacs* (5).]

McCarthy Mahony followed on the same side.

Herbert Wilson K.C., for the insurance company.

S. L. Brown K.C., in reply:—

Although the policy was in the name of the Land Commission, we claim it covers both interests, and that we have an equitable right to the money recovered. The question whether a policy covers more than one interest is a question of fact between the persons involved. Here the third memorandum shows that the policy covered both interests. This is the only possible inference to be drawn from the words "irrespective of the interests involved"; and if the policy were only intended to indemnify the Land Commission against the loss of their security this memorandum would result in a most unnecessary complication. But even if there was not this memorandum, we are in the position of a mortgagor, insuring in the name of the mortgagee, who is in the position of a trustee; and if he does not apply for the money, the mortgagor may do so, and the money must be applied in reinstatement of the premises or in repayment of the mortgage debt.

Cur. adv. vult.

O'CONNOR M.R.:—

This action raises a question of very great importance to the defendants, the Irish Land Commission. It has been brought to try the right of the plaintiffs as successors in title of the owner of a demesne which was sold by him to the Land Commission, repurchased under the provisions of the Irish Land Act, 1903, to moneys recovered under a policy of fire insurance of a unique character, and in a form specially designed for the purpose of securing an annuity payable to the Commission in repayment of an advance with interest of the purchase-money made out of the Land Purchase Fund.

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(1) 11 Q. B. D. 380.

(2) 3 Ves. 71.

(3) 6 Ves. 349.

(4) 5 Q. B. D. 560.

(5) [1897] 1 Q. B. 226.

[His Honor stated the terms of the proposal of the Land Commission and of the undertaking by Mr. Cochrane to repurchase the demesne and to effect the policy of insurance in the terms set out ante, p. 57.]

The purpose to be served by the policy is obvious. The advance for the repurchase with interest was to be repaid by an annuity secured on property, a substantial portion of which was of a perishable nature, and liable to be destroyed by fire. Against this contingency the purchaser was to insure at his own expense; and of course he was insuring not merely for the protection of the Land Commission, but for his own, he being vitally interested in the preservation of the insured property. The interest of the purchaser in the policy was recognized by the provision that he was to give a power of attorney to the Land Commission to recover any moneys payable under the policy. If he was to have no interest in the policy, this provision would be unmeaning.

But the distinguishing feature of the policy was to be a single premium policy covering the risks for a long term of years. But whose risk was it intended to cover? Certainly not the risk of the Land Commission alone, because the person to pay the annuity was as much interested in preserving the property out of which it was to be paid as the person to receive it. And if the purchasing owner was to have an interest in the policy, was the interest to be his only, and not to devolve on his successors in title? This was certainly not the intention, because his ownership was bound in the ordinary course to devolve on some other person during the currency of the annuity. Obviously the insurance was to be effected to insure the property, no matter in whose ownership it was, during the term of sixty-eight and a half years. The payment down of a lump sum as a composition for the premiums, which in the ordinary course would be payable from year to year on a policy renewable from year to year, could have no other meaning. In order to make such a policy effective, according to the intent, it could not have been taken out in the name of the purchasing owner. If it was, it would have insured him, and him only. It would not have insured his successors in title, because under the established principles governing fire insurance policies they only insure the interest of the assured in the subject-matter, fire policies being mere personal contracts enforceable by persons who at the date of the contract and at the date of the loss have an interest in the subject-matter. That being so, it was necessary in the case of the policy in question to have it taken out in the name of an assured whose interest would presumably continue during the whole of the term, viz., the Land Commission, entitled to receive the annuity during the whole term of the policy, and destined to receive it without any transmission of interest, save in the case of redemption—a contingency with which I will deal later on.

No doubt there was another reason for taking out the policy in the name of the Land Commission. It was advisable, for the greater security of the Land Commission, that the moneys payable under the policy should be receivable by them; but this was merely a matter of precaution, the first reason I have mentioned going to the root of the matter. This was the first stage of the transaction, and it indicates the intention of the parties. I will deal later on with the question whether the intention was lawfully and effectively carried out.

The policy was subject to the usual conditions, but attached to and incorporated with it is a memorandum providing, inter alia, that the company should not be at liberty to require the Land Commission to show at any time that its interest in the premises or property amounted to or was commensurate with the extent of the loss or injury which might have at any time accrued, and that the company undertook to pay or make good to the Commission all such loss or injury to an amount not exceeding the sum insured, irrespective of the interests involved. I emphasize the word "interests," as indicating that more than the interest of the Land Commission was in the minds of the parties; but I will come back to this proviso presently.

[His Honor referred to the indenture between Cochrane and the Land Commission, ante, p. 58.]

Now, it is to be observed that the power of attorney given by this indenture is not in accordance with the clause contained in the proposal to purchase, which was to constitute the Land

Commission the attorney of the purchaser for the purpose of obtaining payment of the moneys payable on foot of the policy. The power given was only to enter on the lands and to perform certain conditions of the policy. There was no need for a power of attorney to obtain payment, because the policy was in the name of the Commission, and they were legally entitled to sue on it. Reliance was placed by counsel for the Land Commission on the form of the power of attorney actually given, as not indicating any interest in any person except the person named as the assured. This is no doubt so, but still I think that the agreement in the proposal to purchase pointed at interest in the purchaser in the contemplated policy, and gives a complexion to the entire transaction. I also draw attention to the power of attorney, which purports to be on behalf of the principals, successors in title, but merely for the purpose of showing that they were contemplated to have an interest in the policy. I must now refer to the memorandum attached to the policy relieving the Land Commission from the obligation to show an interest in the subject-matter to the extent of the loss. It was contended on behalf of the Land Commission that this made the policy a wager policy to all intents and purposes, and that the policy moneys were to be held by them for their own exclusive benefit, irrespective of the interests involved. See what this might lead to. A claim might not arise under the policy until the last half year of the term of the annuity. The Land Commission would at that time have been repaid all but an insignificant part of the advance with interest, and would in addition get the policy moneys—in fact, would be paid twice over. This was certainly not the intention of the parties. It must be remembered that the transaction was one carried out by a public department, whose duty it was to aid land purchase by advances of public money, and to secure the repayment of the advances. Security was the only legitimate object, and not a profit out of a gamble. The only intelligible meaning of the transaction is that the Land Commission was to receive the money, and to apply it according to all the interests concerned. The first and paramount interest should be that of the Land Commission, but when that interest was served there came the interest of the owner for the time being of the lands. There is, indeed, no such trust expressly declared, but it is implied by the nature of the transaction—res ipsa loquitur. It is a question of fact in each case what was the interest which it was intended to cover by the policy; was it intended to cover only the interest of the person effecting the policy, or his and another interest? (See judgment of Bowen L.J. in *Castellain* v. *Preston* (1)). We are not troubled in this case with any question arising under 14th Geo. 3, cap. 48, even assuming that this Act applies to fire insurance policies in Ireland, which is doubtful. The validity of the policy has not been questioned by the Land Commission, nor could it be, because the Land Commission has been paid on foot of it, and has now possession of the money. The question of fact is determined in the plaintiff's favour by the nature of the transaction, and particularly by the attached memorandum and indenture, which showed the joint interest of the Commission and the purchaser.

If the Land Commission was the only party entitled to the benefit of the policy, the result would be that it would be entitled to repayment of the full amount of the advance, and also the full amount of the policy. This, it seems to me, would be in excess of their statutory duty, which was merely to secure repayment of the advance made out of the Land Purchase Fund.

On the 15th July, 1915, Cochrane conveyed all his estate and interest in the premises to the plaintiffs, and the annuity payable to the Land Commission has been discharged by them to date. On the 21st November, 1918, the main portion of the insured premises was destroyed by fire, and £1,200 has been received by the Land Commission on foot of the policy.

Stripping the case of all the immaterial surroundings which are mentioned in the pleadings, the question for decision is whether the plaintiffs have any interests or rights in the policy money. The Land Commission has set out the defence that the plaintiffs have no rights or interest whatsoever, and claim the right to appropriate the moneys, and to continue to receive the annuity. They base their defence on two grounds: 1, that Cochrane, the original purchaser, had no interest in the policy; 2, that if he had, that interest did not rest in the plaintiffs as his successors in title. I have already shown that the nature of the transaction necessarily involved a joint interest in the policy in the original owner, Cochrane, and the Land Commission.

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(1) 11 Q. B. D. 380, at p. 398.

But then comes the question: did the interest of Cochrane pass to the plaintiffs as his successors in title?

[His Honor read the 5th condition of the policy, ante, p. 58.]

The exception made in the case of the passing of an interest by will or operation of law is in effect a declaration that the policy shall continue in force for the benefit of the person to whom the property the subject-matter of the policy had passed by operation of law, this being a case excepted from the clause providing for the cesser of the policy. But this is expressly declared by the final words: "Insured herein shall include every such successor in interest to whom the insurance be so declared to be or is otherwise continued." In other words, the "insured" is a person coming within the exception of the case described as the passing of an interest by operation of law.

I will now consider condition 5 specially with reference to the present case. I cannot conceive any passing of interest from the Land Commission except by operation of law, and that in only one way, by the redemption of the annuity during its currency. The owner of the property would on redemption acquire all the interest of the Land Commission, and become the "insured" within the meaning of the policy—a result accomplished by its terms, and in complete accord with the equity of the transaction. This, to my mind, is convincing proof that the parties, including the insurance company, intended, as they must necessarily have, that the owner for the time being was to have an interest in the policy. The right of redemption is a legal incident of a Land Commission annuity, to be carried out by operation of law, which, under the conditions of the policy, makes the redeeming owner "the insured." But it is not merely the original purchaser who has the right to redeem. His successors in title have the same right to acquire the interest of the Land Commission in the property by redemption—an operation of law. And if the original owner becomes the insured by redeeming, so must every subsequent owner who redeems.

It follows from this that on redemption the Land Commission should hand over the policy to the redeeming owner for the time being. Why should the Land Commission keep it? There would no longer be any risk to cover. It may be objected that this reasoning fails in the present case because here there has as yet been no redemption, and the operation of law referred to in the condition would not take place until redemption had been accomplished. There is some force in this, but it is met by the answer that before redemption there is at least an inchoate interest in each successive owner who has a right to redeem in a policy such as we have here—a policy co-extensive with the terms of the annuity. This inchoate interest distinguishes the present case from those in which successors in title have been held to have no interest in policies effected by their predecessors. A purchaser has no interest in the policy of his vendor, because at the date of the policy he is not merely a stranger to it, but to the property insured. A remainderman has no interest in the policy of the tenant for life, because he has no interest in the estate for life. But it could not be said that a vendor who, after the contract for sale had, at the request of the purchaser, and with money supplied by the latter, effected a policy in his own name, could refuse to recognize any right of the purchaser in it. Nor could it be said that a tenant for life who, under the terms of the settlement, was bound to insure a mansion-house could put the moneys recovered under a fire policy into his own pocket.

No doubt as between mortgagor and mortgagee, if one of them effects a policy on the subject-matter of the mortgage, the other has no interest in it, and cannot claim the benefit of it apart from special contract. The reason of this is that the mortgagor or mortgagee in whose name the policy is effected is the only person who is privy to it, and the other is a stranger. But that cannot apply to a policy to which all three parties are privy, being made so by the incorporation of the indenture between the owner and the Land Commission with the policy. The original owner, therefore, had an interest in the policy, but only so long as he continued to be the owner. The Land Commission, as the nominal assured, would be a trustee of that interest, and I think that the documents demonstrate that it was intended that the

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trust should continue for the owners' successors in title, who are expressly mentioned in the incorporated indenture. The power of attorney given on behalf of successors in title was in law inoperative, but it clearly indicated the intention that they should stand in the same position towards the policy as the original owner.

It may be said that even if that were so the original owner did not assign his interest in the policy to the plaintiffs, his successors in title, but I do not think that any express assignment was necessary, because the Land Purchase Act gave them, as I have pointed out, the right to redeem the annuity—the right to acquire the interest of the Land Commission by an operation of law, and so become the "insured" in the strict technical meaning of the policy. This I have described as an inchoate right which brings the plaintiffs into privity with the policy, and enables them to claim the benefit of it.

As against this, it was argued that the policy was a wager policy under the clause in the memorandum. It is not necessary to go into the question whether a wager policy of fire insurance is not void, or to comment on the making of a wager by a great public department; but I will say this, that unless I am coerced by the language of the policy, I am not to construe it as a wager. I do not interpret the memorandum as making the policy an interest or no interest policy. The only object of the memorandum was to make the amount payable independent of the separate loss of the Land Commission, which might only be trifling, while a serious loss might accrue to the owner. The words "irrespective of the interests involved" show that the policy was intended to cover other interests than that of the Land Commission; in fact, that it "involved" other interests, although the whole amount was to be paid to the Land Commission. Indeed, the incorporated documents showed what the other interests were. But the idea of a wager policy is contradicted by the policy itself. The rights of the Commission to indemnity and subrogation are specially provided for by the conditions. These rights are foreign to a wager transaction. Undoubtedly the insurance company are entitled under the policy in question to the usual rights of indemnity and subrogation; and if the Land Commission are entitled to appropriate the policy money, and do so, and still continue to recover the annuity, they will become liable to repay the amount to the insurance company. But I hold that they cannot do so. I wonder have the accountants of the Land Commission considered to what credit the policy money should be carried if it is, as they contend, a wager policy. It seems to me that to be accurate they should open a betting account. In truth, they are not entitled to keep the money. They are not entitled to recover anything more than the annuity. That is the only thing owing to them out of the transaction. Everything above that belongs to the owner of the estate.

As I have already mentioned, there are special circumstances detailed in the pleadings, but it is unnecessary to deal with these, having regard to the view I take. I am of opinion that the plaintiffs are entitled to the benefit of the policy. They are entitled to have the policy moneys applied in reinstating the buildings or reimbursing the plaintiffs, who are reinstating them, or in having them applied towards the redemption of the annuity.

The plaintiffs having succeeded, are entitled to the costs of the action, to be paid by the defendants, although it cannot be said that the Land Commission acted in any way perversely or unreasonably. The form of policy is unique, and the position was somewhat obscure. This action will settle their rights, and they will know how to deal with future cases arising out of the same form of policy.

Solicitors for the plaintiffs: *Cochrane & Co.*

Solicitor for the defendants: *H. M. P. Hare.*

Solicitors for the North British and Mercantile Insurance Co.: *Wm. Roche & Son.*

R. R.

In re THE CORK EMPLOYERS' FEDERATION, Limited.

Powell J.
1920.
Dec. 14.

Company—Memorandum of association—Alteration—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *sect.* 9—*Practice—Notice to creditors—Advertisements.*

The memorandum of association of a company incorporated in 1909 under the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), stated the objects to be (among others) to promote the trade interests of the members of the federation in or about the County of Cork. Resolutions were duly passed altering certain clauses in the memorandum, and adopting new clauses intended for the better protection of its members, and extending the scope of the operations of the federation. The federation had issued no debentures, and had no trade creditors. A petition having been filed to obtain the sanction of the Court to the proposed alterations:

The Court fixed a day for the hearing of the petition, and, as there were no parties to be served with notice of the petition, directed an advertisement of the hearing of the petition in one of the local newspapers.

Summons for Directions.

The Cork Employers' Federation was established in 1909, and was, on the 30th July, 1909, incorporated under the Companies (Consolidation) Act, 1908, as a limited company.

The objects of the company, as set out in clause 3 of the memorandum of association, were (inter alia): (*a*) to promote the trade interests of the members of the federation in the County and City of Cork and neighbourhood, and generally to promote trade and commerce in said districts, and to protect the members by federation, amalgamation, or otherwise, and to co-operate with any other associations, companies, bodies corporate, or persons in the United Kingdom, and having interests in common with the members of the federation; (*b*) to consider all questions affecting the interests of the trade, trades, business, or businesses carried on by the members; (*c*) to protect and indemnify the members against any loss arising in the management of their trade, trades, or business without their actual privity or default, which, in the opinion of the federation, should, in its interests, or the interests of the trade generally, be made good.

At general and extraordinary general meetings of the company, held in June and July, 1920, resolutions were passed altering certain clauses: clause (*a*), so as to extend the operations of the company, as therein stated, to the whole of Ireland; rescinding clause (*c*), and adopting a new clause, viz. (*c*), to protect the members of the federation against any loss arising in the exercise or management of their trade, trades, or business from or by reason of strikes, lock-outs, or labour troubles, of whatever nature or kind, which, in the opinion of the federation, should, in its interests, or in the interests of trade and business generally, be made good.

A petition, dated the 27th November, 1920, was duly lodged on the 30th December, 1920, to obtain the sanction of the Court to the proposed alterations. The federation had issued no debentures, and had no trade creditors whatever; its liabilities for salaries, rent, taxes, and otherwise were about £19 per week, and the assets were far more than sufficient to pay all the debts. The present summons was brought by the company for directions as to the service of the petition, and as to the proceedings to be taken preliminary to the hearing of the petition.

Hungerford, for the company:—

No rules have been passed in Ireland dealing with petitions for the alteration of the objects of a company under sect. 9 of the Companies (Consolidation) Act, 1908. We have, therefore, applied and followed the rules of the Supreme Court (Ireland), dated the 27th June, 1910, for the purposes of enabling companies to apply for reduction of capital, so far as the same could be adapted. As there are no debentures and no creditors, and as no person will be prejudiced by the proposed alterations in the memorandum of association, I ask that a day be fixed for the hearing of the petition, and that the petition be heard without the usual preliminary advertisements for creditors, &c. A similar order was made in *In re The Ulster Marine Insurance Company, Limited* (1).

POWELL J.:—

I direct that the petition be heard on the 17th January, 1921, and, as there are no parties to be served with the petition, I direct a short advertisement in one of the Cork local papers, stating that the petition will be heard on that day.

Solicitor for the company: *A. W. Winder.*

D. M. S.

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(1) 27 L. R. Ir. 487.

KERRY COUNTY COUNCIL *v.* TRALEE AND FENIT PIER AND HARBOUR COMMISSIONERS.

(1917. No. 814.)

Powell J.
1919.
July 13, 15.
1920.
Feb. 27.
Appeal.
1920.
Nov. 3.

Harbour — Pier — Maintenance — Rates — Receiver over gross income — Application of rates in order prescribed by Act of Parliament (43 *&* 44 *Vict. c. lxxxv*).

A body of persons was by statute, confirming a provisional order, incorporated, and was empowered to construct and maintain a pier, and to levy rates for the use thereof. The Order directed that the moneys received for rates should be applied for the purpose and in the order following, and not otherwise, namely:—1. In paying the costs of the provisional order. 2. In paying the expenses of the collection and receipt of rates and income. 3. In paying the expenses of the maintenance, repairs, improvement, management, and regulation of the harbour and pier, and in the execution and maintenance of such other works, buildings, and conveniences as might be necessary for the improvement of the said harbour, pier, and works. 4. In payment of the interest of any money borrowed. The corporation mortgaged to the plaintiff the said pier, harbour, works, etc., together with the power to demand and recover the rates leviable for the use thereof. In an action by the mortgagees claiming (inter alia) the appointment of a receiver:

Held, that a receiver should be appointed over the gross amount of the rates, who should, out of the moneys received by him, pay all expenses proper and necessary for the maintenance and working of the defendants' undertaking as provided by the Order, and from time to time lodge his balances to the credit of the action.

The defendants were incorporated by a Provisional Order, the Tralee and Fenit Pier and Harbour Order, 1880, made by the Board of Trade under the General Pier and Harbour Act, 1861 (24 & 25 Vict. c. 45), and confirmed by the Pier and Harbour Orders Confirmation Act, 1880 (43 & 44 Vict. c. lxxxv). By that Order the defendants were empowered to construct and maintain a certain pier and works, and to levy rates, tolls, and dues for the use thereof. Section 25 of the Order was as follows:—"The rates received under this Order shall be applied for the purposes and in the order following, and not otherwise:—1, In paying the costs of and connected with the preparation and making of this Order; 2, in paying the expenses of the collection and receipt of rates and income, the salary payable to the auditor, and the sum payable to any inspector appointed by the Board of Trade; 3, in paying the expenses of the maintenance, repairs, improvement, management, and regulation of the harbour, pier, and works, authorized by this Order, and the maintenance and execution of such other works, buildings, sheds, warehouses, wharves, jetties, and conveniences as may from time to time be necessary for the improvement of the said harbour, pier, and works, and the accommodation of the shipping resorting thereto; 4, in payment of the interest of any money borrowed under this Order; 5, in from time to time providing the instalments or creating a sinking fund for the payment of the money borrowed in such manner, so far as circumstances will permit, that all money borrowed may be discharged within fifty years from the time of borrowing." The defendants were required to submit their annual account to the Board of Trade. By the Order the defendants were empowered to borrow at interest such sums, not exceeding £95,000, as might be required for the purposes of the Order on the security of the works authorized by the Order, and of the lands and property connected therewith, and of the tolls, rates, and dues authorized by the Order, and to grant mortgages of such property or of any part thereof as security for the repayment of the money so borrowed, with interest thereon.

Section 23 of the Order was as follows:—" The Commissioners may from time to time lease the rates authorized by this Order for any period not exceeding ten years, to take effect in possession at the best rent to be reasonably obtained without fine, and on such other terms and conditions as they think fit, and the lessee shall have, and may exercise during the continuance of this lease, the same powers of levying and recovering rates and dues as the Commissioners have or might exercise under the Harbour, Docks, and Piers Clauses Act, 1847, and this Order, and shall be subject to all the provisions as to accounts and otherwise to which the Commissioners are made subject by this Order."

The pier and works were subsequently constructed by the defendants.

By indenture of mortgage, dated 9th March, 1883, the defendants, to secure certain moneys advanced to them, mortgaged to the Secretary of the Grand Jury of the County of Kerry and his successors the undertaking of the defendants, together with all premises, works, appliances, and conveniences provided for the working of the said harbour and pier, and all tolls, rates, dues, and other moneys leviable by and payable to the defendants; this mortgage contained a proviso that on certain default of payment by the defendants it should "be lawful for the mortgagee and his successors to enter into possession of the said pier, harbour, and works, and into receipt of the tolls, rates, and dues payable and to become payable in respect of the said pier and harbour." By the Local Government (Ireland) Act, 1898 (61 & 62 Vict. c. 37), sect. 16, this mortgage vested in the plaintiffs.

The action was brought for an order declaring that all moneys due for principal and interest under the said mortgage were well charged in favour of the plaintiffs upon the undertaking of the defendants with all premises, works, appliances, and conveniences provided for the working of the said pier and harbour, and all tolls, rates, dues, and other moneys leviable by and payable to the defendants on account of the amount due on foot of the said mortgage, and that payment thereof be enforced by the appointment of a receiver or otherwise.

Wilson K.C., *T. Sullivan K.C.*, and *Roche*, for the plaintiffs:—

The plaintiffs do not ask for the appointment of a manager at present. They require protection in support of their charge, and ask that a receiver be put into receipt of the tolls which the defendants are authorized to levy; the receiver should get the gross amount and make payments in the priority prescribed by sect. 25 of the Order. The mortgage provides that it shall be lawful for the mortgagees to enter into receipt of the tolls, rates, and dues, that is, the gross amount of the tolls, rates, and dues. A lessee of the tolls would have the same right under sect. 23 of the Order. [They referred to *Ames* v. *Birkenhead Docks* (1); *De Winton* v. *Mayor of Brecon* (2); *Attree* v. *Hawe* (3); *Blaker* v. *Herts and Essex Waterworks Co.* (4); *Carnegie* v. *Greenock Harbour Trustees* (5); *Crewe* v. *Edleston* (6).]

(1) 20 Beav. 332.
(2) 26 Beav. 533.
(3) 9 Ch. D. 337.
(4) 41 Ch. D. 399.
(5) [1910] A. C. 274.
(6) 1 De G. & J. 93.

Conner K.C. and *T. O'Donnell*, for the defendants:—

The receiver can only be empowered to receive from the defendants the amount remaining after they have applied the moneys received by them as they are required by sect. 25 of the Order to apply them. The proper form of order in the present case is that made in *Marshall* v. *South Staffordshire Tramway Co.* (1). They referred to *Blaker* v. *Herts and Essex Waterworks Co.* (2); *Hull, Barnsley, and West Riding Dock Co.* (3).

Wylie K.C. and *Overend*, for the Local Government Board.

Morgan Byrne, for the Listowel Urban District Council.

J. M. FitzGerald, for the Listowel Rural District Council.

POWELL J. [The Judge having declared the plaintiffs entitled to the relief claimed, proceeded:—]

The question which I have to decide in this matter is as to the scope of the powers and duties of the receiver.

Mr. Herbert Wilson K.C., on behalf of the plaintiffs, does not ask for the appointment of a manager at present, but he says that the plaintiffs require protection and support for their charge by way of receipt by them of the tolls authorized to be levied by the Act of Parliament. He says that the receiver should collect the gross receipts and should pay in the order provided by sect. 25 of the Tralee and Fenit Pier and Harbour Order, 1880: (*a*) the expenses of the collection and receipt of rates and income, the salary payable to the auditor, and the sum payable to any inspector appointed by the Board of Trade; (*b*) the expenses of the maintenance, repair, improvement, management, and regulation of the harbour, pier, and works authorized by the Order, and the execution and maintenance of such other works, buildings, sheds, warehouses, wharves, jetties, and conveniences as may from time to time be necessary for the improvement of the harbour, pier, and works, or the accommodation of the shipping resorting thereto; (*c*) the interest on any money borrowed under the Order, which would be a payment to the plaintiffs themselves on foot of a sum of £60,000 due to the plaintiffs, and not barred by the Statute of Limitations.

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(1) [1895] 2 Ch. 36. (2) 41 Ch. D. 399. (3) 57 L. T. 82.

Mr. Wilson referred to the terms of the Order made by Sir John Romilly in *Ames* v. *The Trustees of the Birkenhead Docks*(1). In a suit by mortgagees of a dock against the trustees and a judgment creditor, the chairman was appointed receiver of the tolls, with a direction to pay into Court the balance after paying the expenses of carrying on the concern, and the interest on the mortgages. He says (at p. 350):—"I dissent from the argument which suggests that the powers of the Act vested in the trustees are superseded, and that it has thereby become impossible, so long as this continues, for the undertaking to be lawfully carried on. What the receiver takes are the rates, tolls, and rents. Out of the moneys so received by him he pays the expenses of the undertaking and interest to the mortgagees, and the balance into Court. The undertaking continues to be managed by the trustees. They enter into contracts; they engage and dismiss workmen and servants, and do all the other matters which are entrusted to them by the statutes. The expenses they incur in so doing are paid by the receiver, who in that character has nothing to do with the management. He simply pays the bills and moneys which the trustees require him to pay, subject to account hereafter if anything improper should take place in relation to such payment. He then pays the interest due to the mortgagees, and he pays the balance into Court, all of it subject to account when required. So far from there being in such a course of proceeding anything which exceeds the jurisdiction of this Court, or the provisions of the statute, it appears to me to be in strict accordance with them, and that, having regard to the scope and policy of the Acts, this Court would not have sanctioned the appointment of a receiver which had not, as far as possible, provided for the future working and continuance of the undertaking established by the Legislature. If no such power of taking possession existed, the mortgage would be a worthless security, and the mortgagee would be at the mercy of the mortgagor, who, in that case, might say to him, 'if you attempt to enforce your mortgage you destroy the property mortgaged.'"

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(1) 20 Beav. 332.

But such is not, in my opinion, the construction of the statute or the operation of the general law upon the provisions contained in it. He also referred to *De Winton* v. *The Mayor of Brecon* (1), in which the Master of the Rolls (at p. 541) says that where the Act authorizes a mortgage it authorizes, as incident to it, all necessary remedies to compel payment; and in the case of tolls, all power to this Court to appoint a receiver, and to continue the receiver over the tolls, rents, and stallages of the market, but over nothing else.

Mr. Wilson also referred to the case of *Lord Crewe* v. *Edleston* (2), in which case Lord Justice Turner, reviewing the facts and the law applicable to the circumstances of that case, made an order appointing a receiver of the rents, profits, and income of the said tolls, toll gates, and toll houses, such receiver not to interfere with the letting of the said tolls without further order of the Court. He then directed the modes of payment and application in respect of these tolls in the way he indicates.

Mr. Conner K.C., on behalf of the defendants, contended that the receiver should not have any power to collect tolls, and that no power should be given to him except, as I understand, to receive from the Commissioners such sum as remained after they had applied the receipts in the manner specified by sect. 25. He referred to sect. 12 of the Confirmation Order of 1880, which gives the Commissioners, subject to the provisions of the Order, power to construct and maintain all works, buildings, and conveniences necessary for the accommodation of vessels and traffic, and for laying down and maintaining rails, tramways, sidings, and so on, along the pier, and for dredging, scouring, deepening, widening, improving, and maintaining the entrances and channels to the pier; but it appears to me, having regard to sect. 25, that the rates received have to be applied for the purposes specified in sect. 25, and in the Order specified in sect. 25; and it is not contended by Mr. Wilson that the payments mentioned in sub-s. 3 can in any way be interfered with by the receiver. Mr. Conner relied on *Marshall* v. *South Staffordshire Tramway Co.* (3). The question at the trial for Kekewich J. was whether the Court had jurisdiction to make an order for the sale of the defendant company's undertaking, and for the appointment of a manager in addition to a receiver until sale. Questions arose between two sets of debenture-holders with which I am not concerned. The Judge held that the plaintiff had no right to have a manager appointed, and that all they were entitled to was the appointment of a receiver, with proper inquiries as in *Gardner's Case* (1), and that the order must follow the form in *Gardner's Case* (1), and this decision was affirmed by the Court of Appeal.

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(1) 26 Beav. 533. (2) 1 De G. & J. 93. (3) [1895] 2 Ch. 36.

The effect of the appointment of receivers in *Gardner's Case* (1) is stated by Lord Justice James in his judgment in *Attree* v. *Hawe* (2). The result of that case, he says, was that the receiver, whose appointment the debenture-holders were entitled to have made, was in truth nothing but a cashier or treasurer imposed upon the company. He could not appoint or discharge a ticket-taker, or a railway porter, or an engine-driver, or platelayer. Every servant of the railway would still be under the directors, and their wages and salaries would be fixed by them. All purchases and contracts for the use of the railway would be made by them. The receiver, as treasurer, would take all the moneys received by every officer of the company, would thereout pay all outgoings on the warrant of the directors, the statutory managers of the concern, and would then apply the net surplus, being the net earnings of the business, in discharge of his immediate principals, the debenture-holders. His functions would be, except as to the net surplus, neither more nor less than those of a banker appointed to receive all the moneys of a large brewery; and to pay all the cheques of the persons properly authorized to draw on the account.

In *Blaker* v. *Herts and Essex Waterworks Co.* (3), referred to in *Marshall's Case* (4), almost the entire of Mr. Justice Kay's judgment is devoted to showing that the debentures in that case gave to the debenture-holders no more than the fruit of a waterworks undertaking, and not a power to sell the undertaking, upon the principle of *Gardner's Case* (1); and, at page 408, he said that the only other question was whether a manager could be appointed, and in reference to that he said that the charge was not to hinder or interfere with the business of the company, and that therefore it seemed to him that in this respect also the case was within the decision in *Gardner's Case* (1); and he discharged so much of the orders appealed from as appointed a manager, but continued the appointment of the receiver.

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(1) L. R. 2 Ch. 201.
(2) 9 Ch. D. 348.
(3) 41 Ch. D. 399.
(4) [1895] 2 Ch. 36.

I do not think that the order which Mr. Wilson asks for is at variance with the orders made in *Gardner's Case* (1), which, in *Marshall's Case* (2), Mr. Justice Kekewich and the Court of Appeal decided was the proper order.

The authority of a judicial factor in Scotland, a person in the same position as a receiver in this country, is dealt with by Lord Atkinson in his judgment in *Carmichael* v. *The Greenock Harbour Trustees* (3). By the Greenock Harbour Act, 1880 (43 & 44 Vict. c. clxx), s. 70, the Sheriff had power to appoint a person to receive the whole or a competent part of the rates and duties and other revenues of the trust until the arrears of interest or principal, as the case might be, in respect of moneys borrowed on the security of the rates and duties and other revenues were fully paid. The judicial factor appointed in that case claimed to be entitled to demand for sugar shipped into or unshipped from foreign vessels at the Port and Harbour of Greenock a rate of 1*s.* 3*d.* a ton, being the maximum authorized by the Greenock Harbour Act, 1880, the rate so fixed by the appellant being in opposition to the wishes of the respondents, the Greenock Harbour Trustees, who insisted that the rate should be only 10*d.* a ton, the rate fixed by them prior to the appointment of the judicial factor. Lord Atkinson pointed out that the Judges in the Court below had held that the judicial factor was merely a receiver of the tolls and incomings of the undertaking, and not its manager, and that he did not supersede the trustees in the discharge of their duties further than was necessarily involved in this receipt of the tolls, and was not clothed with their powers. He said that that decision was right, and that so far, but only so far, as was necessary to effect the purpose of the section, the judicial factor necessarily supersedes the trustees, but that the power to receive rates or tolls or income did not and could not imply a power either to increase the different sources of income or to destroy them; that the power and duty of the factor was confined in this respect to receiving those sums which at the time of his appointment the trustees were entitled to receive, and not the sums which by some act of theirs which they never performed they might thereafter entitle themselves to receive.

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(1) L. R. 2 Ch. 201. (2) [1895] 2 Ch. 36. (3) [1910] A. C. 274.

Powell J.
1920.

Kerry Co. Council *v.* Tralee Harbour Commrs.

I refer the matter to Chambers to appoint a fit and proper person receiver over the undertaking of the defendants, and all tolls, rates, and sums of money arising by virtue of the said Order received by him, who shall, as provided, pay all the expenses of the receipt and collection of the rates and tolls, and of the maintenance and working of the undertaking, as provided by sect. 25 of the Order, before applying any part of the moneys in payment of the amount due to the plaintiffs, with liberty to apply in respect of any payment to be made by the receiver, and generally.

The defendants appealed to the Court of Appeal.

1920.
Nov. 3.

The Court (1), without calling on the respondents, affirmed the decision of Powell J.

Solicitor for the plaintiffs: *F. H. Downing.*

Solicitor for the defendants: *T. Huggard.*

Solicitor for the Local Government Board: *J. Mecredy.*

Solicitor for the Listowel Rural District Council: *J. Moran.*

Solicitor for the Listowel Urban District Council: *H. J. Marshall.*

M. G. E.

(1) Sir James Campbell C., Ronan and O'Connor L.JJ.

Appeal.
1920.
April 19, 20, 26.

PATRICK M'DONNELL *v.* SARAH STENSON (1).

(1919. No. 944.)

Landlord and tenant—Lease for three lives and ninety-nine years, whichever shall continue longest, with a covenant by landlord to nominate new life on death of every cestui que vie dying during the term of ninety-nine years—Non-renewal—Laches—Death of tenant—Purchase under Land Purchase Acts—Registration of Title—Devolution.

By an indenture of lease, dated the 1st February, 1832, lands were granted to M., his heirs and assigns, for the lives of three persons, and for the term of ninety-nine years, whichever should continue longest, with a covenant by the landlord that, on the death of each cestui que vie dying during the term, the landlord would nominate another life in place of that of the cestui que vie so dying. The cestuis que vie named in the lease died in 1863, 1864, and 1893 respectively, and no new life was ever nominated. The lessee's interest under the lease became vested in B. M., who signed an agreement for the purchase of the lands under the Land Purchase Acts, on the 1st November, 1915, and who died intestate on the 11th February, 1918, the advance of the purchase-money having been sanctioned in January, 1918. The lands were duly registered under the Local Registration of Title Act, 1891 (54 & 55 Vict. c. 66).

On appeal from Powell J. ([1920] 1 I.R. 88): *Held*, by Ronan L.J., that the right of renewal had not been lost, and by O'Connor L.J. that such right of renewal had been lost, Sir James Campbell C. not giving a decision upon this question.

Held, by the Court, that under the Local Registration of Title Act, 1891 (54 & 55 Vict. c. 66), sect. 84, on the death of B. M. the lands did not vest in the plaintiff as her heir-at-law, but devolved as personalty.

APPEAL.

By indenture dated the 1st February, 1832, Sir Francis Lynch Blosse demised and granted to James M'Ellinn certain lands "to have and to hold all and singular the said premises hereby demised or intended so to be, with their and every their appurtenances (except as before excepted) unto the said James M'Ellinn, his heirs, executors, administrators, and assigns, from the day next before the day of the date of these presents, for and during the natural life and lives of Robert Lynch Blosse, Wm. Lynch Blosse, and Francis Lynch Blosse, the first, second, and third sons of the said Sir Francis Lynch Blosse, and for and during the natural life and lives of such other person or persons as by virtue of a clause for renewal hereinafter mentioned may be added thereto, and for and during the term, time, and space of ninety-nine years, to commence at and be computed from the first day of May last past, whichever of the said lives or years shall continue longest," at the rent of five shillings per year. The covenant for renewal contained in the said lease was as follows: "And the said Sir Francis Lynch Blosse doth for himself, his heirs, executors, administrators, and assigns, covenant, promise, and agree to and with the said James M'Ellinn, his heirs and assigns, in manner following, that is to say, that in case the cestui que vie in this indenture named should happen to die before the expiration of the said term of ninety-nine years, that then and in such case he, the said Sir Francis Lynch Blosse, his heirs and assigns, shall and will, on the death of the person so happening first to die as aforesaid before the expiration of said term of ninety-nine years, and on payment of all rent and arrears of rent then due and owing, add and insert to the time and term of this demise the life of such person as he, the said Sir Francis Lynch Blosse, his heirs or assigns, shall nominate and appoint in the place and stead of the person so happening first to die as aforesaid, which life so to be added and inserted is to be endorsed on this indenture, or written on a separate deed or label for that purpose, and in like manner from time to time during the said term of ninety-nine years upon the death or failure of any other cestuis que vie in this indenture named or hereafter to be successively nominated as aforesaid, and upon payment of all arrears of rent which shall then be due, that then he, the said Sir Francis Lynch Blosse, his heirs and assigns, shall and will immediately after the death or failure of every other such cestui que vie so successively happening to die before the expiration of said term of ninety-nine years as aforesaid, add and insert to the time and term of this demise the life of such other person as he, the said Sir Francis Lynch Blosse, his heirs or assigns, shall nominate, which several lives so to be nominated and inserted successively are to be endorsed on this indenture, or written on separate deeds or labels as aforesaid."

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(1) In the Court of Appeal, before SIR JAMES CAMPBELL C., and RONAN and O'CONNOR L.JJ.

By another indenture dated the 28th August, 1855, Sir Robert Lynch Blosse demised and granted to Patrick M'Ellinn other lands, to hold unto the said Patrick M'Ellinn, his heirs and assigns, during the lives of three cestuis que vie therein named, and for the term of ninety-nine years, whichever of the said lives or years should continue longest, with a covenant for renewal similar to that contained in the said lease of the 1st February, 1832. The cestuis que vie named in the lease of the 1st February, 1832, died in 1863, 1864, and 1893 respectively; those named in the lease of the 28th August, 1855, died in 1870, 1893, and 1915 respectively, and no new life was ever nominated in the case of either lease.

Both of the said leases became vested in one Barbara M'Donnell, who died intestate on the 11th February, 1918. Barbara M'Donnell signed an agreement to purchase the leasehold premises under the provisions of the Irish Land Purchase Acts on the 1st November, 1915; the advance of the purchase-money was sanctioned on the 2nd January, 1918, and a fiat purporting to vest the lands in the said Barbara M'Donnell was made per incuriam on the 29th May, 1919, but this fiat was void, owing to the previous death of Barbara M'Donnell.

This summons was brought by the plaintiff, claiming to be entitled to the lands comprised in the land purchase agreement as heir-at-law of the said Barbara M'Donnell, against the defendant, who was the personal representative of the deceased, for the determination of the question of the ownership of the lands.

By his order, dated the 20th January, 1921, Powell J. decided that there was subsisting an equitable freehold in the lands comprised in the leases, which passed to the plaintiff as heir-at-law of the said Barbara M'Donnell. Hence this appeal by the plaintiff.

Leonard K.C. and *Carson*, for the appellant:—

The heir-at-law of Barbara M'Donnell never had any interest in the premises formerly comprised in either lease. We contend—1, that the principles relating to the right of a tenant to compel a landlord to renew have no application, because in each of these

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(1) [1920] 1 I. R. 85.

leases there was a concurrent term; 2, the question as to whether the right to renew has been lost by efflux of time, or acquiescence or laches, does not arise, because the irresistible inference is that the parties had long since agreed to have no more renewals, but to be satisfied with the concurrent term; 3, the reasoning in the judgment of Powell J. is in favour of the defendant, and his decision is based merely on the decision in *Allen* v. *Murphy* (1). That decision, however, is not applicable here, and the reasoning of the judgments therein, when applied to the facts of this case, and the provisions contained in the two leases, would justify a decision in favour of the landlord, if this were, which it is not, a contest between the landlord and the heir-at-law of the lessee as to the right to renew; 4, in any case, assuming that Barbara M'Donnell had some equitable freehold interest in the premises in addition to the concurrent terms, the purchase by her of the lands under the provisions of the Irish Land Purchase Acts, whereby she acquired an interest descendible as personalty, effectually put an end to any interest which could descend to the heir-at-law. The advance was sanctioned on the 2nd January, 1918, which was prior to the date of the death of Barbara M'Donnell. The interests of the personal representative of the deceased were not prejudiced by the fact that there was no vesting order or fiat actually made before the death of deceased.

James Henry, for the respondent:—

I submit that the order of Powell J. was correct in holding that Barbara M'Donnell was entitled to an equitable freehold estate descendible to her heir-at-law on her death intestate. *Allen* v. *Murphy* (1) is conclusive as to this case, and shows that the mere lapse of time did not render the covenants to renew contained in these leases inoperative. The equity of the Tenantry Act applies, although that Act is conversant only with the right of renewal in cases where there is a fine, and here there is no fine. No time is specified after the death of a cestui que vie for the renewals to be made, and here it was the duty of the landlord to renew, there being no fines payable. Where everything has been done by the tenant which he should have done under the lease, equity will relieve the tenant in analogy to the relief given under the Tenantry Act. If I am correct as to the right to renewals not having determined, it follows that the interest of Barbara M'Donnell was an equitable freehold interest, the interest of the landlord being a mere reversion in fee, and the effect of the land purchase proceedings was to vest the landlord's interest in the purchasing tenant.

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(1) [1917] 1 I. R. 484.

[The following cases were cited and discussed:—*Hussey* v. *Domvile* (1); *M'Dermott* v. *Caldwell* (2); *Domvile* v. *Callwell* (3); and reference was made to Furlong's Landlord and Tenant, pp. 274, 275; Lyne on Leases, pp. 64, 169, 220.]

SIR JAMES CAMPBELL C.:—

In this case the Congested Districts Board became owners by purchase under their powers of the estate of Lynch Blosse. They subsequently entered into an agreement under the Land Purchase Acts with Barbara M'Donnell for the sale to her of their interest as reversioners of outstanding leases. The sale to this lady included three holdings, held under leases, and a town park, held from year to year. The agreement unites the three holdings into one for the purpose of sale; and one sum, £289, is mentioned as the purchase price. The agreement bears date November 1st, 1915, and was in the usual prescribed form in the case of a sale by a landlord to a tenant of a holding. The advance was sanctioned on February 15th, 1918. The leases under which two of the holdings were held are leases for lives renewable in the events mentioned, with in each case a concurrent term of ninety-nine years. It is said they are exceptional leases in two respects: 1, by reason of the existence of a concurrent term—apparently the industry of counsel has failed to discover any case under the Renewable Leasehold Conversion Act in which this coincidence occurred; 2, the covenant for renewal, contrary to the usual practice, imposes, not upon the tenant, the lessee, but upon the lessor the obligation of renewing and of nominating a life on the death of the life mentioned in each lease.

(1) [1900] 1 I. R. 417, 428.

(2) I. R. 10 Eq. 504.

(3) [1907] 2 I. R. 617.

There has admittedly been no renewal under this obligation, the last life under the leases having expired a considerable number of years ago—at least twenty-seven years ago. Powell J. thought the rights continued down to a more recent period; but for at least twenty-seven years they had ceased to exist. In these circumstances it is contended by Mr. Henry on behalf of the heir-at-law of Barbara M'Donnell, who has died since the completion of the agreement, that the equity of renewing this lease, which he claims still exists, is vested in him, and that therefore the estate and interest of Barbara M'Donnell under the purchase agreement passed to him and not to her personal representative.

In view of the effect I attribute to this transaction between the Congested Districts Board and the lessee, it is not necessary for me to pronounce any decided opinion upon one of the main questions argued, viz., whether as a result of the events which had happened the lessee had or had not forfeited the right to have the leases renewed and fresh lives nominated. That is a very difficult question, complicated by reason of the exceptional fact that there was a concurrent term, and also by the peculiarity that the obligation of nominating lives was imposed upon the lessor and not upon the lessee. Had the obligation been imposed upon the lessee, I think it would be very difficult for the lessee to contend that the right was still preserved, and that it had not been lost or allowed to lapse by neglect for such a long interval of time; but it may be that a lessee with a concurrent term of years is in this respect in a better position. This is a very difficult question. No case bearing upon it has been cited; and, as at present advised, I wish to leave it open.

I pass to the next question. What was the effect of this transaction between the Congested Districts Board and Barbara M'Donnell, who claimed to be the owner of the lessee's interest under the two leases? It clearly had the effect of vesting the lands in this lady for an estate in fee-simple. Of course she had her own original interest, but in addition she acquired the reversion, and became to all intents and purposes the owner in fee-simple; but it is provided by the Local Registration of Title Act that the devolution in such a case is to be as if the property were personal estate, and therefore upon her death all her estate and interest passed, not to Mr. Henry's, but to Mr. Leonard's client; and, if that be true, then the first question does not necessarily arise for decision.

It is curious that this second question appears to have been overlooked by Powell J. I think it very probable that the matter was not really pressed in argument, or that his attention was not called to it in such a way as to impress him with the fact that it was one of the matters he had to decide, otherwise I think he would have dealt with it in his judgment. We have to deal with it; and we have to decide that the estate and interest of this lady passed to her personal representative, and not to her heir-at-law.

Ronan L.J.:—

From the report of this case in the Court below, it would appear that the only question argued before Powell J. was whether the right of renewal was lost at the date of the death of Barbara M'Donnell. The agreement for purchase by her is not referred to either in the head-note or the statement of the facts of the case. Powell J. in his judgment incidentally refers to the vesting order, but attaches no importance to it. The Lord Chancellor has stated the facts as to this purchase. We are all of opinion that it effected a conversion, and on this ground (which was not considered by Powell J.) we think the decision of Powell J. must be reversed. If the vesting order had been made in the lifetime of the lady, there would have been no doubt at all in regard to the case. The principle of conversion stated by Palles C.B. in *Steele's Estate* (1) depends on the principle that equity regards as done that which ought to be done. We had a very elaborate discussion on the question in *Burdett's Estate* (2); but I wish to state that every point which gave trouble in that case is absent here. In the first place, the contract there was conditional, and it did not become absolute in the lifetime of the deceased. This was a conditional contract, but the advance was sanctioned in the lifetime of the deceased; and therefore at her death it was an absolute contract. In the next place, there was a difficulty as to whether the contract was capable of specific performance; but in this case, after the advance was sanctioned, the

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(1) [1913] 1 I. R. 292.
(2) Unreported. Settled after argument.

Land Commission could decree specific performance in a summary way. In the third place, there was a discussion as to whether the general policy of the Land Purchase Acts was not opposed to conversion; but, as the Lord Chancellor has said, if there is one thing plain from these Acts it is that it was intended to vest the fee-simple in the tenant at the earliest moment.

We have here an absolute contract at the date of the death of deceased; a contract capable of specific performance, and therefore a more complete case of conversion it is difficult to conceive. The conversion is not of real estate into money, but of a chattel interest into fee-simple, and there is an absolute statutory duty on the Land Commission to register the land. For these reasons I agree with the Lord Chancellor and O'Connor L.J. on this question.

As to the only question decided by Powell J., i.e., whether the right of renewal was lost, I am of opinion that his decision was right, for the following reasons:—The leases may be taken as identical for the purposes of this case. Each is a lease of a vacant plot of ground, with 23 feet frontage, on the main street of Balla, and 490 feet deep. The nominal rent of 5 shillings per annum is reserved on each. The real consideration for the lease is a covenant by the tenant to build a substantial dwelling-house according to the annexed plans to the satisfaction of the landlord. The first lease is dated February 1st, 1832, and there is a clause that if the house is not completed before January 5th, 1833, the lease shall then be void, and the term cease. There is a stringent covenant by the tenant to keep the said house and all other buildings in repair, and so deliver up. The only obligations which the lease purports to cast on the tenant is the payment of the rent, and the performance of these covenants and a further covenant not to erect buildings for habitation other than the house. The term granted is for three lives named, "and for the lives of such other person or persons as by virtue of a clause for a renewal hereinafter mentioned may be added thereto, or for and during the term of ninety-nine years, whichever term of said lives or years shall continue longest." There can be no doubt that under this the tenant gets—1, a definite term of ninety-nine years, and 2, whatever additional term is conferred by the covenant, which is as follows:—[His Lordship read the covenant as above set out, and continued.] It is plain that this covenant in no way interferes with the definite term of ninety-nine years. It is a covenant to renew during ninety-nine years, but preceded by the grant of a term of ninety-nine years to the tenant. Counsel have informed us that they found no case with this peculiarity. The term in all the cases was for the original and added lives only. There was not in any of them a term granted for the specified period. This entirely distinguishes the case from all the authorities to which we have been referred. In the other cases the tenant, once the original lives have dropped, has, until actual renewal, only the equitable term created by the covenant. When the original lives have dropped, he at once becomes a trespasser at law. Even if rent is subsequently received, it only makes him a yearly tenant, and it is vital to remember that at the dates of the leases in this case, a yearly tenant could at any time be ejected by notice to quit without any claim for compensation. If, therefore, the tenant lost the right of renewal, his interest in the land ceased both at law and in equity. In fact, once the original lives dropped, the equitable term was his only title.

Here it is wholly different. He had a legal and absolute term of years. For practical purposes the covenant to renew only became operative on the expiration of that term. It entitled him, at the expiration of that term, to have a further term of three lives then in being. That was the only advantage in addition to the ninety-nine years.

There is a second vital distinction between the present case and all those to which we have been referred. In all these cases the equitable term was a conditional term, only to come into being by the performance of the condition by the tenant, i.e., the covenant to renew was subject to the performance of a condition by the tenant. In the present case it is an absolute term. The covenant by the landlord is an absolute covenant. There is no condition precedent to be performed by the tenant. In all the cases the essential condition precedent was the nomination by the tenant of the life or lives to be added. It was for the lives so nominated that the landlord covenanted to renew. Thus, in *Hussey*

v. *Domvile*, No. 2 (1), it is "upon the nomination by the said W. S. (the tenant), within six months next after the death of the person so happening first to die as aforesaid of any other life, to be, at the request of the said W. S., put and inserted in the place of the person so dying." In *Domvile* v. *Callwell* (2), the case mainly relied on by the appellant, it is "on the nomination of the life of any other person by the said O. M. (the tenant), instead of the person so happening first to die." In both cases it was held that the true construction of the covenant required a regular course of nomination by the tenant on the fall of each life, mainly on the ground that the concluding words of the covenant were that the life so added should be indorsed on deed or in a separate writing, "declaring the life or lives so failing, *and the three lives in being during which the said estate shall continue.*" These words will be found italics in the judgments in *Hussey* v. *Domvile*, No. 2 (1), at pp. 272, 273, 274; they will also be found at pp. 279, 280, and 281. They seem to lie at the root of all four judgments in that case. In *Domvile* v. *Callwell* (2) these same words will be found relied on in the judgments at pp. 639, 640, and 648.

In the present case the final clause of the covenant does not contain the crucial words, "the three lives in being during which the said estate shall continue." These cases do not decide the construction of the covenant in the present case; there is the vital distinction I have pointed out. But I prefer to rest my judgment on a wider ground. We must take the covenant as we find it: an absolute covenant by the landlord to grant what is substantially an additional term of lives after the expiration of the years, that is, an equitable term. This is the first case in which it has been suggested that the tenant has forfeited the equitable term where he has not failed to perform the conditions prescribed by the lease. The nomination of the lives is the essential thing in all the cases. The term was lost because he failed to nominate the lives as the lease prescribed he should do. Assuming the covenant in this case to have the same construction as in the other cases, that only amounts to this: that the tenant, if he thought fit, could have compelled the landlord to renew as each life dropped. That was not of the essence of the contract, which was that at the end of the ninety-nine years he should have the additional term. The continuous renewals were the mode pointed out by which the landlord was to perform his unconditional covenant to give this additional term. It was to the landlord's advantage if the tenant permitted him to select the three lives at the last moment. If the tenant allowed him this advantage, is it any evidence that he thereby abandoned his absolute right to the additional term? Save as to this advantage to the landlord, it was immaterial to the tenant how and when the landlord nominated the three lives for the additional term. Where the effect of not enforcing the strict terms of the covenant is to turn the tenant into a trespasser, an inference of an abandonment or release may be possible; but a case of an existing absolute term of years is wholly different.

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(1) [1900] 1 I. R. 417, 428; [1903] 1 I. R. 265.

(2) [1907] 2 I. R. 617.

In a case where—1, there is practically no rent; 2, there is an existing term; 3, there is an absolute unconditional covenant by the landlord to grant the additional term; 4, the tenant has performed all his obligations under the lease; up to this there has been no suggestion that the term was forfeited simply by the landlord's non-compliance with the strict terms of his own covenant. None of the cases remotely approaches this. On the contrary, *Domvile* v. *Callwell* (1) seems to me a strong authority the other way. To put it shortly, where, on the nomination of the lives the landlord's obligation to renew became absolute, that is, the tenant had performed the conditions precedent, it was there held, in the words of the head-note: "Held also, that a formal renewal was not necessary to preserve the lease if the nominations had been duly made." Here the obligation to renew was originally absolute, and the duty of nominating the lives was cast on the landlord. Here the only thing the tenant failed to do was to insist on an additional renewal. This was really held to be immaterial.

O'CONNOR L.J. :—

Barbara M'Donnell died on the 15th day of February, 1918, intestate, possessed of two leaseholds, one created by an indenture of 1st February, 1832, and the other by an indenture of the 28th August, 1855, the first being made to a man named James

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(1) [1907] 2 I. R. 617.

M'Ellin, and the other to a man named Patrick M'Ellin. The leases are, substantially, the same in form. The habendum is: "To hold to the said lessee, his heirs, executors, administrators, and assigns"; the term of each lease was ninety-nine years, with a concurrent term of lives—Robert Lynch Blosse, William Lynch Blosse, and Francis Lynch Blosse—and each contained a covenant for renewal in the terms following:—[His Lordship read the covenant. See ante, p. 81.]

The lives mentioned in the leases expired as follows:—William Lynch Blosse died in 1863; Francis Lynch Blosse died in 1864; and Robert Lynch Blosse died in 1893. No renewal was ever granted.

Barbara M'Donnell signed an agreement to purchase the premises under the Land Purchase Acts; the agreement was signed on the 1st November, 1915; the advance was sanctioned on the 2nd January, 1918; a fiat purporting to vest the lands in Barbara M'Donnell was made on the 29th day of May, 1919. This fiat was made per incuriam, and is clearly void, Barbara M'Donnell having been dead.

Barbara M'Donnell's son now claims that at the date of her death she was entitled in equity to an estate pur autre vie, and that he as special occupant, being her heir-at-law and heir-at-law of the original lessees, is now entitled to the same. On the other side, Barbara M'Donnell's daughters contend that, inasmuch as the leases were never renewed, and, as they say, the tenant had lost her right to renewal by laches, the leasehold was not an estate pur autre vie, but a leasehold for years only. They contend, alternatively, that having regard to the agreement for purchase, Barbara M'Donnell became entitled to an equitable fee, descendible by statute as personalty. I am against the heir-at-law on both points.

I have read all the cases cited in argument, and in my opinion none of them is really helpful. This case must be decided, in my opinion, on first principles. The first life died in 1863. Thereupon it became the landlord's duty to nominate a life and execute a renewal. No time was fixed by the covenant for the landlord to fulfil this duty; where no time is fixed the law, generally speaking, at any rate, says the duty shall be performed within a reasonable time.

Counsel for the respondent argues that no duty was cast upon the tenant to nominate a life, or to call upon the landlord to perform his duty. That is quite true, but it does not get over the difficulty in the respondent's way. This case has to be considered in this way: could Barbara M'Donnell, say, a year before her death, have compelled the landlord to nominate three lives, and execute leases accordingly? I am of opinion she could not. She or her predecessors in title had lain by since 1863, when the first life dropped; if there is anything clearly established in a Court of Equity it is this, that a plaintiff who has deliberately and with his eyes open lain by without insisting on his rights when they accrue will afterwards receive no assistance from a Court of Equity when the enforcement of his right would prejudice the defendant. And surely, it is to the prejudice of the landlord if he is to be compelled to renew a lease for lives at a time other than the time at which his covenant required him to renew it. To hold otherwise would be to sanction the notion that the tenant could lie by till the day before the expiration of the term, and then compel the landlord to nominate and renew for three lives. I am of opinion, therefore, that the right to require renewal was absolutely gone, and that the term was, both at law and in equity, an estate for years only.

Being of opinion that the appeal should be allowed on this ground, it is really not necessary to decide the second ground. But I see no answer to the appellant's argument on this head. The contract for the acquisition of the fee was, in the events that happened in this case, an absolute and not a conditional contract, for the condition—the sanction of the advance—was performed. On the plain ground that equity considers that as done which ought to be done, I consider that Barbara M'Donnell, at the time of her death, held these lands as equitable owner in fee, the fee being, by statute (1), descendible as personalty. On both grounds, therefore, I am of opinion that the decision of Powell J. should be reversed.

Solicitor for the appellant: *A. V. Thornton.*

Solicitor for the respondent: *S. G. Rutherford.*

R. ST. J. C.

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(1) 54 & 55 Vict. c. 66 s. 84.

IN THE MATTER OF A CONTRACT MADE BY JOHN CLIBBORN AND SIR PERCY COX WITH MICHAEL HORAN AND ANNE HORAN, AND IN THE MATTER OF THE VENDOR AND PURCHASER ACT, 1874.

M. R.
1920.
Nov. 17, 18.
Dec. 18.

CLIBBORN *v.* HORAN.

(1920. No. 997.)

Vendor and purchaser—Testamentary gift—Power of appointment—Gift over in default of appointment—Implied gift—Rescission by purchaser before summons—Possessory title not forced on purchaser.

Testatrix made a devise of lands, held under a lease for lives renewable for ever, to A for life, with a power of appointment to A among her children, but made no gift to the children, and no gift over in default of appointment.

Held, there being nothing in the instrument creating the power from which the intention that the objects should take in default of appointment could be gathered, that A took a mere life estate coupled with a power of appointment, and that, there being no trust for the children, there was consequently no gift by implication to them.

Brown v. *Higgs* (4 Ves. 708), *In re White's Trusts* (Johnson, 656), *Burrough* v. *Philcox* (5 My. & Cr. 73), discussed and distinguished. *Healy* v. *Donnery* (3 I. C. L. R. 213), *In re Weekes' Settlement* ([1897] 1 Ch. 289), discussed and followed.

VENDOR AND PURCHASER SUMMONS for a declaration that the vendors had complied with the purchaser's requisitions in the title to the lands agreed to be sold in accordance with the contract of sale. The property for sale was a share of a sub-fee-farm rent, to which Bernard Butler was absolutely entitled at his death.

By his will, dated 10th May, 1839, Bernard Butler devised all his real and personal property to his wife, Maria Butler, for her life, with remainder to his niece, Louisa Hamilton, for life, with power, notwithstanding her coverture, to will and dispose of the same amongst her children in such shares as she might think proper. It was admitted that this was only a power to appoint by will and not by deed. The will of Bernard Butler was proved on the 24th December, 1846.

The testator's wife survived him, and died many years ago. His niece, Louisa Hamilton, went into possession as the next tenant for life. She had two sons, John Butler Hamilton and Charles James Hamilton. By deed of appointment, dated 9th March, 1898, purporting to be an exercise of the power vested in her by the will of Bernard Butler, she appointed, inter alia, the share of the fee-farm rent mentioned, to her son John Butler Hamilton, and appointed other property devised by the will to her son Charles James Hamilton.

By an agreement under seal, dated 9th March, 1898, the same date as the appointment, made between John Butler Hamilton of the first part, Charles James Hamilton of the second part, and Louisa Hamilton of the third part, reciting the appointment, and that doubts had arisen as to whether Louisa Hamilton had power to make an appointment otherwise than by will, it was agreed, inter alia, by John Butler Hamilton and Charles James Hamilton that the appointment should be deemed to have been validly exercised.

Garrett Walker K.C. (with him *Phelps*), for the vendors :—

We admit that the power given to Louisa Hamilton was testamentary only, and that the appointment by deed of March 9th, 1898, was inoperative. But we can give a perfectly good title, for though there is no express gift in the will of Bernard Butler to the children of Louisa in default of appointment, in the absence of any gift over there is an implied gift to the objects of the power: *In re White's Trusts* (1); Farwell on Powers, 2nd ed., p. 468. The objects of the power are the children of Louisa who survived her. But in any case the vendors have been in possession of this one-third of the rent for more than twelve years, and the purchasers are bound to accept this title : *In re Atkinson and Horsell's Contract* (2).

Murnaghan, for the purchaser :—

A gift to a person for life with power to that person to appoint to a class is not by itself sufficient to create an implied gift to the members of that class in default of appointment:

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(1) Johnson, 656.

(2) [1912] 2 Ch. 1.

Healy v. *Donnery* (1). There must be a trust coupled with the power: *In re Weekes' Settlement* (2). The statement in Farwell on Powers has been disapproved so far as the Irish Court is concerned: *In re Hall, Sheil* v. *Clark* (3). There is no trust in Bernard Butler's will.

This case is distinguishable from *In re Atkinson and Horsell's Contract* (4), for we repudiated the contract on February 17th, 1920, whereas in that case the purchaser by bringing the summons treated the contract as subsisting. The Court will not force a purchaser to take a possessory title unless it involves him in no risk, and the vendor can show where the true title is, which has not been done here: *Ashe* v. *Hogan* (5).

Garrett Walker K.C., in reply:—

On the 17th February the title we now offer was before the purchaser. I submit that where there is a power to appoint among certain objects, and no gift in default of appointment, the Court will imply a gift to the objects. The law laid down in *Burrough* v. *Philcox* (6), *White's Trusts* (7), and in *Brown* v. *Higgs* (8) is clear, where the facts were similar to those in this case. In Farwell on Powers, 2nd ed., p. 466, the rule is thus stated:—"If there is a power to appoint among certain objects, but no gift to those objects, and no gift over in default of appointment, the Court implies a trust for or a gift to those objects equally if the power be not exercised." A decision in favour of the purchaser involves overruling *Brown* v. *Higgs* (8), *White's Trusts* (7), and the law as stated by Lord Justice Farwell. *Healy* v. *Donnery* (1) is explained by the consideration that the first taker took an absolute interest in the property in the first instance. *Atkinson and Horsell's Case* (4) lays down a universal rule that it is no objection that a part of the title is possessory.

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(1) 3 I. C. L. R. 213.
(2) [1897] 1 Ch. 289.
(3) [1899] 1 I. R. 308.
(4) [1912] 2 Ch. 1.
(5) [1920] 1 I. R. 159.
(6) 5 My. & Cr. 73.
(7) Johnston, 656.
(8) 4 Ves. 708.

O'CONNOR M.R. :—

[His Honor having stated the facts as above set out, and having stated the agreement of 9th March, 1898, proceeded :—]

This was certainly a most curious piece of conveyancing. The draftsman evidently thought that he was giving an indefeasible title to the appointees, but he failed to see that if the appointment was bad, and if no subsequent appointment was made by will, the property would pass to the testator's heir-at-law as undisposed of realty, unless, indeed, the will could be construed as giving Louisa Hamilton's children an estate in default of appointment. This, however, is not so, as I shall show hereafter.

The infirmity of the titles of John Butler Hamilton and Charles James Hamilton under the appointment by deed, and the attempted confirmation of it seems to have occurred at a later date to the mind of Louisa Hamilton, because by her will dated the 24th December, 1898, she re-appointed the property in the same way as she had previously done by deed.

She died on the 17th December, 1902, and her will was proved on the 22nd October, 1903. Unfortunately her son, John Butler Hamilton, died a very short time before her, viz., on the 26th October, 1902, with the result that, so far as the appointment in his favour by the will was concerned, it failed. His title, however, was treated as valid, and the trustees of his will, who are the vendors in the present case, went into, and are still in receipt of, the fee-farm rent. The abstract of title as originally furnished was not complete. It was supplemented by giving the purchaser's solicitor a copy of the deed of appointment, and then the objection was taken that it was altogether inoperative. That was met by furnishing the deed of confirmation, dated the 9th March, 1898, but on perusing it the purchaser's solicitor wrote saying that his counsel, having carefully considered the matter, could not advise his client to accept the title, and he called for a return of his deposit. The vendor's solicitor then wrote asking what the objection to the title was. There was no immediate reply to this inquiry. Apparently the purchaser's solicitor thought that he had already stated his objection, and that he had rescinded the contract by asking for a return of his deposit. I think that this was a reasonable view to take, because he had previously objected to the appointment by deed, and that objection was met by the production of the deed of confirmation, which really had not the intended effect. Later on the purchaser's solicitor wrote saying that he was instructed to issue a writ for the return of the deposit. This was met by a declaration of the vendor's intention to issue a writ against the purchaser for specific performance. The present summons was taken out in lieu of the threatened action.

Now, it is perfectly clear that if the title as exhibited was defective, and the purchaser's objection was good, and remained unanswered for a reasonable time, he had a right to rescind. I think that it is equally clear that he did in fact rescind. He refused to complete the purchase, and demanded a return of the deposit. The question, therefore, is: was the title as exhibited bad? It was clearly bad unless there was an implied gift by the will of Bernard Butler to the children of Louisa Hamilton in default of appointment, which is the contention of the vendors.

Mr. Walker, for the vendors, relied on the general proposition that where there is a power to appoint among certain objects, and no gift in default of appointment, as is the case here, the Court will imply a gift to the objects. In my opinion the proposition thus stated is too wide. There must be something in the instrument creating the power from which the intention that the objects shall take in default of appointment can be gathered. This is the result of the authorities.

Healy v. *Donnery* (1) is the leading Irish authority. There a testator by his will devised property to his daughter for life, with power to her by deed or will to dispose, devise, or bequeath it to and among her children in such shares and proportions as she should think fit and proper. It was held that the power was a naked one, not coupled with a trust, and that no estate was given to the children by implication. Pennefather B. stated the law in language which has received approval. He said: "It is argued that the power to appoint among the children is tantamount to a trust created for them. I have always considered that there was a distinction between a mere power and one coupled with a trust;

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(1) 3 I. C. L. R. 213.

and though I called on counsel for an authority to the contrary, no such case has been cited. But particular cases have been cited in which Courts have thought that they collected from the peculiar words of the power an intention of the testator to give to children in default of appointment." To the same effect is *In re Weekes' Settlement* (1), where the gift was by a testatrix to her husband for life, with a power to the husband to appoint among the children of the husband and wife. It was held that this did not imply a gift to the members of the class in default of appointment. Romer J. said: "The authorities do not show, in my opinion, that there is a hard-and-fast rule that a gift to A for life, with a power to A to appoint among a class and nothing more, must, if there is no gift over in the will, be held a gift by implication to the class in default of the power being exercised. In my opinion, the cases show (though there may be found here and there certain remarks of a few learned Judges which, if not interpreted by the facts of the particular case before them, might seem to have a more extended operation) that you must find in the will an indication that the testatrix did intend the class or some of the class to take—intended, in fact, that this power should be regarded in the nature of a trust, only a power of selection being given, as, for example, a gift to A for life, with a gift over to such of a class as A shall appoint." Romer J. then goes on to deal with the authorities, and he cites *Healy* v. *Donnery* (2), quoting from the judgment of Pennefather B. the passage I have read, which, he said, contained a correct statement of the law.

He then deals with *Brown* v. *Higgs* (3), *Burrough* v. *Philcox* (4), and other cases, including *White's Trusts* (5), and *In re Chaplin's Will* (6). He shows that in all these cases there were certain features which either indicate a trust in favour of the objects of the power, or which contained a gift to the objects with a mere power of selection to the appointee. Mr. Walker relied on *White's Trusts* (5), and the judgment therein of Woods V.-C., in which occurs the following passage:—"It is settled by *Brown* v. *Higgs* (3) and *Burrough* v. *Philcox* (4) that where there is a power to appoint among certain objects and no gift in default of appointment, the Court will imply a gift to the objects of the power equally." Romer J. comments on that in this way:—"I have pointed out that these two cases do not decide that. I have no doubt Woods V.-C. in making that statement meant it to be considered with reference to cases where the facts were similar or somewhat similar to those in *Brown* v. *Higgs* (1) and *Burrough* v. *Philcox* (2), that is to say, cases where you can gather from the will that the class are intended to take, and a selection only is given to the person having the power of appointment, as was shown by the observation in *Burrough* v. *Philcox* (2), to which I have already referred."

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(1) [1897] 1 Ch. Div. 289.
(2) 3 I. C. L. R. 213.
(3) 4 Ves. 708.
(4) 5 My. & Cr. 73.
(5) Johnson, 656.
(6) 2 Dr. & Sm. 527.

On these authorities I am bound to hold that there was no implied gift to the children of Louisa Hamilton; that the will of Bernard Butler gave her a mere life estate, coupled with a power which she was free to exercise or not as she thought fit, and that there was no trust for the children. Possibly the testator intended that the children should take the estate, even though the power should not be exercised, but there is no such intention expressed or to be gathered from the will, and I am bound by the will. The title, as exhibited, was therefore bad, and the purchaser was entitled to rescind it, and did in fact rescind it.

In this state of affairs the summons was taken out, and the vendors now offer to make title in a different way—under the Statute of Limitations. Mr. Murnaghan, for the purchaser, meets that offer by the reply that it is too late, as the contract was rescinded before the case came into Court, and that he is not now under any obligation to complete it. He relies upon the very case cited by Mr. Walker in support of the proposition, that a possessory title may be forced upon a purchaser if it appears, on the hearing of a vendor and purchaser summons or an action for specific performance, that title may be made in this way, although the abstract offered only a documentary title. This was *Atkinson and Horsell's Contract* (3), in which a summons was taken out by a purchaser for a declaration that the vendor had not shown good title, and for a return of the deposit. The

(1) 4 Ves. 708.
(2) 5 My. & Cr. 73.
(3) [1912] 1 Ch. 2; [1912] 2 Ch. 1.

vendor showed that he was in a position to make title under the statute. The purchaser objected, 1, that he was not bound to take a possessory title under the contract; and, 2, that he had repudiated the contract, as he was entitled to do, because a good title had not been shown. This last point was held to be untenable in the circumstances, because the summons was taken out by the purchaser asking for rescission, and not for a declaration that the contract had been rescinded. He had treated the contract as a subsisting one. This is the judgment of Cozens-Hardy M.R. on the point:—"The purchaser takes out a summons, and asks for rescission, treating the contract as still subsisting, and does not raise the point either in the form of the summons or upon affidavit that the contract was well repudiated before the summons was taken out, and he is content to rely on that repudiation apart from anything else. On that ground I think that that particular objection is not open to him, and that if he succeeds at all in this appeal it cannot be on that ground." Fletcher-Moulton L.J. and Buckley L.J. concurred on this point. But the present summons has been taken out by the vendor, and the purchaser comes into Court and says he has rescinded the contract. That is an entirely different case, and I must hold that the purchaser is right on this point, and entitled to have the summons dismissed and to have his deposit returned.

This is an end of the matter, and I do not think that I ought to go into the question whether, if the rescission point had not been open, the purchaser would be bound to accept a possessory title in this case. It has been laid down in *Atkinson and Horsell's Contract* (1), as a general proposition, that a vendor is entitled to force a possessory title on a purchaser, notwithstanding that the contract was for a documentary title, and I would be bound by that decision; but I think that the question is still open whether—although it must be accepted as a general rule that a possessory title can be substituted for a documentary title—this is a proposition of universal application, no matter what the nature of the estate the subject of the contract. In *Ashe and Hogan's Contract* (2) I discussed this question, and I pointed out the difficulty in applying it to leasehold estates, having regard to the quality of

(1) [1912] 1 Ch. 2; [1912] 2 Ch. 1. (2) [1920] 1 I. R. 159.

the title acquired by possession, as decided in *Tichbourne* v. *Weir* (1).

The point may come up at a future time. Perhaps, too, the weighty reasons given by Fletcher-Moulton L.J. for not forcing a possessory title on a purchaser who had contracted for a title to be exhibited in the ordinary way will yet come up for consideration by the House of Lords.

Solicitors for plaintiff: *Darley, Orpen, & Synnott.*
Solicitor for the defendant: *J. L. Burke.*

R. R.

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(1) 67 L. T. 735.

Powell J.
1921.
n. 31.

IN RE COLLINS, DECEASED; FERRIS v. COLLINS.

Devolution of interest in land—Lands registered under the Local Registration of Title (Ireland) Act, 1891—*Devolution of interest on the death intestate of the registered owner—Local Registration of Title (Ireland) Act,* 1891, *sections* 22, 83, 84, 85.

The estate of the grantor in a fee-farm grant having been sold under the Irish Land Act, 1903 (3 Edw. 7. c. 37), to the grantee C. and vested in him, he was, pursuant to the provisions of the Local Registration of Title (Ireland) Act, 1891 (54 & 55 Vict. c. 66), registered as the owner of the lands subject to an annuity of £2 0*s.* 4*d.* payable to the Land Commission.

On the death intestate of C.: *Held,* that the lands devolved on his personal representative, and that C.'s heir-at-law took no beneficial interest therein.

ORIGINATING SUMMONS.

David Collins, of Tullyvallen, in the County of Armagh, died on the 2nd February, 1920, intestate. Portion of his estate consisted of a farm, containing 17A. 3R. 36P., statute measure, of which, at his death, he was registered as owner in fee-simple in folio No. 8764 of the Register (County Armagh) of the Land Registry under the Local Registration of Title (Ireland) Act, 1891 (54 & 55 Vict. c. 66). The lands were formerly held, subject to a perpetual fee-farm rent of £9 18*s.* 5*d.*, under a fee-farm grant dated the 28th July, 1863. David Collins became entitled to the lands under a conveyance dated the 22nd January, 1900. The estate of the grantor in the fee-farm grant of 28th July, 1863, was sold to David Collins under the provisions of the Irish Land Act, 1903, and the vendor's estate was duly vested in David Collins, pursuant to the provisions of the said Act, and on the 26th July, 1912, David Collins was registered as owner, subject to an annuity of £2 0*s.* 4*d.*, payable half-yearly to the Irish Land Commission, until an advance of £62 should be paid; and it was stated in the folio that David Collins was registered as owner in fee-simple of the lands comprised in the folio.

The plaintiff, as administratrix of David Collins, deceased, offered the lands for sale by public auction. William McBurney was declared the purchaser, and signed a contract to buy the lands at the price of £1,005, pursuant to certain conditions of sale. The sale was not completed, as the defendant Hugh Collins claimed as heir-at-law of David Collins that he was absolutely entitled to the lands. The plaintiff as administratrix and one of the next-of-kin of David Collins brought the present summons for the determination of the question, whether on the death of David Collins the farm in question comprised in folio No. 8764 of the Register, County Armagh, of which David Collins was then registered owner, devolved on the plaintiff as his personal representative on his death intestate, or whether the said Hugh Collins as heir-at-law of David Collins became beneficially entitled thereto.

R. D. Megaw, for the plaintiff:—

These lands, formerly held in fee-simple under a fee-farm grant, were sold under the Land Act of 1903 to the tenant, who was registered as owner. The registration was compulsory under sect. 22 of the Local Registration of Title (Ireland) Act, 1891. Part IV of the Act, which deals with the devolution of freehold registered land sold under Land Purchase Acts, declares (sects. 84, 85) that such land shall devolve on the personal representative of the deceased, and that the beneficial interest shall devolve as if it were personal estate as to which the deceased had died intestate.

Lavery, for the defendant, the heir-at-law of David Collins, deceased:—

The Act contemplated that lands held on tenancies from year to year should continue to be personalty, and it was never intended that lands already held in fee-simple should be turned into personalty. "Such land," in sect. 85, means land compulsorily registerable under sect. 22. The lands in question were not compulsorily registerable. These lands were already vested in the tenant in fee-simple, subject only to a fee-farm rent, and were not, by the Land Purchase proceedings, vested in the purchaser. The effect of the Land Purchase proceedings was simply to transfer the head-rent in the fee-farm grant to the Irish Land Commission.

POWELL J.:—

Following the plain words of sects. 83, 84, and 85 of the Local Registration of Title (Ireland) Act, 1891, I am of opinion that on the death of David Collins intestate these lands devolved on the plaintiff, the personal representative, and that Hugh Collins, the heir-at-law, took no beneficial interest therein

Solicitors for the plaintiff: *Fisher & Fisher & Cromie.*
Solicitors for the defendant: *Collins & Collins.*

D. M. S.

In the Matter of the Trusts of an Indenture of Settlement dated the 5th day of September, 1893, and made between Anthony Thomas Gilfoyle, deceased of the first part, Mary Elizabeth Cullen of the second part, and the said Anthony Thomas Gilfoyle, Thomas Mangan, Richard Bourne, and Joseph Patrick Cullen of the third part; and in the Matter of the Trusts of the Will of the said Anthony Thomas Gilfoyle, deceased, dated the 28th day of May, 1904, and of two Codicils thereto dated respectively the 16th day of July, 1897, and the 25th day of January, 1912; and in the Matter of the Estate of the said Anthony Thomas Gilfoyle, deceased.

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Feb. 18.
March 4.

Between MARY ELIZABETH GILFOYLE and JOSEPH PATRICK CULLEN, Plaintiffs, and HENRY ROGER WOOD-MARTIN and HIS MAJESTY'S ATTORNEY-GENERAL FOR IRELAND, Defendants.

Ademption—Marriage settlement—Jointure charged on lands—Will devising lands on trust for sale—Income to jointress for life—Sale by testator under Land Purchase Acts—Purchase-money paid to trustees of settlement—No ademption of trusts of will—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 22, *sub-s.* 5.

A settlement creating a jointure provided, inter alia, that if the settled lands were sold £10,000 should be set apart by the trustees to secure the jointure, and subject thereto should be held for the settlor, his heirs, and assigns, but that any surplus over the £10,000 should belong to the settlor, his executors, administrators, and assigns free from any claim in respect of jointure. By his will the settlor devised his lands on trust for sale, the income to be paid to the jointress for life during her widowhood, and subject thereto the proceeds to be paid to charities. The settlor entered into agreements to sell his estates under the Irish Land Purchase Acts, and the sales were completed before his death. The entire purchase-money, which amounted to more than £10,000, was paid to the trustees of the settlement, and was left in their hands by the settlor during his life.

Held, that as the settlor in selling the lands had only done what he had directed his trustees to do, and as there had been no subsequent appropriation of the proceeds, there was no ademption of the trusts of the will, and that the jointress was entitled during her widowhood to the income of the entire fund.

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ORIGINATING SUMMONS.

By settlement made on the marriage of Anthony Gilfoyle with Mary Cullen certain lands situate in County Sligo were limited to the use of the said Anthony Gilfoyle and his heirs until the marriage, and afterwards to the use that the intended wife during the joint lives of husband and wife should receive thereout the annual sum of £50, and after the decease of the husband, if the wife should survive him, that she should receive thereout the yearly sum of £300 by way of jointure, and subject thereto to the use of the husband, his heirs, and assigns; and it was declared that, subject as thereinafter mentioned, the said settlement should operate as a settlement within the meaning of the Settled Land Acts, 1882 to 1890, and that all the provisions of the said Acts should apply thereto as fully and in the same manner in all respects as if the settlement thereby created constituted a settlement within the meaning assigned to that expression by the said Acts. It was further declared that the trustees were trustees for the purposes of the said Acts. Then followed other provisions for the purpose of bringing the settlement to all intents and purposes within the Settled Land Acts, and, amongst others, a provision that all capital moneys which should arise from any sale should be paid to the trustees, and should be dealt with and applied as capital moneys arising under the Settled Land Act, 1882.

The settlement also contained a provision that on a sale of the lands £10,000 should be set apart to secure the pin-money and jointure, and subject thereto for the husband, his heirs, and assigns, and that any moneys received over and above £10,000 should belong to the husband, his executors, administrators, and assigns, freed from all claims on account of the pin-money or jointure.

By his will, dated 28th May, 1904, Anthony Gilfoyle gave certain pecuniary legacies, and directed his executors to expend £50 towards the putting into and keeping in proper repair and condition his family burial-place in the Roman Catholic churchyard at Killenaule, in the County Tipperary, and the rails enclosing same. He bequeathed all the residue of his estate, except his house and lands in the County of Sligo and the furniture and household effects and other chattels in and about said house, to his trustees therein named upon trust for sale and investment, and, in the event of his having no children (which happened), to divide the moneys and securities amongst ten or more charitable institutions in Ireland (therein called the "selected charities") in such shares and proportions and subject to such conditions as they in their absolute and uncontrolled discretion should think fit, only provided that they did not apply any portion thereof to the benefit of any hospitals except those which receive patients of all religious denominations. He then devised and bequeathed to his trustees his mansion-house of Carrowcullen and all his landed estates of whatever tenure and wherever situate, and all horses, carriages, furniture, and effects in or about the mansion-house upon trust to sell and convert the same into money, and invest the proceeds of such sale and conversion, with power to his trustees to postpone the sale and conversion as long as they in their absolute discretion should think fit; and he directed his trustees to pay the annual income, rents, and profits arising from such property until sale, and of the proceeds thereof when sold to his wife during her widowhood (subject to a cesser of her life estate in the event of his having a son). He also directed that until the said mansion-house of Carrowcullen should be sold his wife might during her widowhood continue to occupy and enjoy the same, together with the furniture and effects therein, and all horses, carriages, and other chattels in or about said house, and the gardens, stables, pleasure-grounds, and untenanted lands appertaining thereto, provided that she should reside there permanently, but that in the event of her ceasing to reside there permanently (of which his trustees should be the sole judges), she should forfeit her right to the said house and premises; and, subject to his wife's right to occupy the premises and to the estate and interest of his wife during widowhood, he directed his trustees to divide the said property among the selected charities in the same manner as was thereinbefore provided with regard to the other portions of his estate. The testator had no landed property except that comprised in the settlement.

In the year 1907 he agreed to sell portion of the lands to the tenants thereof under the Irish Land Act, 1903. Shortly after, by a codicil to his will dated 16th July, 1907, he appointed his wife a trustee of his will in lieu of a trustee who had died. He revoked a legacy, and made some other alterations (not material to this case), and in all other respects confirmed his will. On the 1st November, 1907, the testator agreed to sell a further portion of the lands to the tenants. On the 25th January, 1912, he made a second codicil to his will, whereby he directed that in the event of his dying without issue, and after the death or re-marriage of his wife, or after she should forfeit or have forfeited her right to occupy and enjoy the said mansion-house, as provided by his will, his trustees should be at liberty to convey as a gift the said mansion-house and its appurtenances to a society or community for charitable or religious purposes; and, having given certain directions as to sale of the said mansion-house, in case it should become necessary to sell same, he confirmed his will as amended by the first codicil. The testator subsequently agreed to sell other small portions of his tenanted lands.

On the 3rd October, 1918, all these sales were completed, and the lands agreed to be sold were vested in the occupying tenants, so that the testator, the trustees of his marriage settlement, and his wife ceased to have any estate therein, legal or equitable. On the same date all claims against the lands were, in pursuance of the Irish Land Act, 1903, attached to the purchase-money. The lands remaining unsold consisted only of the mansion-house and lands enjoyed therewith, a small holding excluded from the sale, two labourers' plots, and a coastguard station.

In December, 1918, the purchase-moneys were allocated by the Land Commission, and the sums of £13,108 10*s.* 11*d.* War Loan 5 per cent. and £848 Guaranteed 3 per cent. stock were transferred to the trustees of the marriage settlement. These sums represented the capital moneys coming to them after paying all prior charges, and they exceeded the sum of £10,000 provided for by the settlement as a security for the pin-money and the jointure.

Anthony Gilfoyle was entitled to call upon the trustees to transfer to him such portion of the fund as would remain after setting apart such portion thereof as represented £10,000, but he allowed the whole fund to remain in the names of the trustees during his life. He died on the 12th June, 1920, and his will and two codicils were admitted to probate on the 26th October, 1920.

The plaintiffs, as trustees of the settlement and will and codicils, brought the present summons for the determination of the question, amongst others, whether on the true construction of the indenture of settlement and of the will and codicils, and in the events that had happened, the whole or any part of the sum of £13,108 10*s.* 11*d.* 5 per cent. War Stock, and a sum of £408 Guaranteed 3 per cent. stock representing part of the purchase-money of those parts of the lands comprised in the said settlement which had been sold under the Irish Land Purchase Acts, and were in the hands of the said Joseph Patrick Cullen and Henry Wood-Martin as trustees of the said settlement, were subject to the trusts declared by the said will concerning the landed estates of the testator, or whether the whole or any part of the purchase-moneys were subject to the trusts declared by the said will concerning the residuary estate of the testator.

Newett, for the plaintiffs, as trustees of the will.

Herbert Wilson K.C. and *Walker K.C.* (with them *Oliver Murphy*), for the plaintiff, Mary Elizabeth Gilfoyle:—

We claim all lands sold under the Land Purchase Acts, and that the proceeds of the sale are real estate. If this is established under the will, the plaintiff is tenant for life. The settlement of 1893 provided for jointure, and the will of 1904 makes a larger provision for the wife, and gives her a life estate in his real property; if not in all his real estate, at least in the £10,000. Otherwise his personal estate, amounting to about £20,000, and his real estate to about £14,000, will go to the charities, except the £300 yearly to his wife, although he expressly made provision for her by his will. The agreements to purchase would conditionally create a conversion dependent upon completion by the Land Commission: *In re Huddleston's Estate, No.* 2 (1). What was the testator's intention? He was leaving his wife a life estate in the mansion-house, with £300 a year to keep it up. Intention to adeem the trust is thereby negatived, for this would be absurd. Another argument against conversion is the way testator allowed the lands to be dealt with in the Irish Land Commission. The sale was carried out under the Settled Land Acts, and the whole of the balance was paid to the trustees as trustees for the purpose of the Settled Land Acts under the settlement of 1893. There was no necessity to do this, unless the testator wished all the purchase-money to be treated as realty. We rely on sect. 22, sub-s. 5, Settled Land Act, 1882. Mr. Gilfoyle could have had the surplus over the £10,000 paid to himself; he did not do that, but allowed it all to go to the trustees as trustees for the purposes of the Settled Land Acts. [They also relied on *Waldron* v. *Rosslin* (1), decided before the Settled Land Acts.]

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(1) [1921] 1 I. R. 1.

E. S. Murphy K.C. (with him *Lipsett*), for the Attorney-General:—

I agree as to the presumed intention of testator. But taking the will and its wording, and the testator having the settlement before his mind, there is a bequest of all residue, except the house, lands, and furniture, on trust to convert. The words of the will must be construed as they stand. Seeing then that the lands were sold and turned into money, the words "all residue" would carry that money. Where there are agreements to purchase, prima facie there is conversion: *Steele* v. *Steele* (2).

In *In re Marley* (3) there had been no completion of the Land Commission proceedings; and it was held there was no conversion, but that there would have been conversion on completion. Here there was a proviso in the settlement that if the settlor wished to sell the lands he could do so if he paid to the trustees £10,000, so that he was absolute owner of the surplus over £10,000. By the proviso the surplus was to go to the testator, his executors, administrators, and assigns; and, therefore, there was a clear distinction drawn between the purchase-money of the lands and the lands themselves. I submit that the £13,000 is all personalty, and goes to the charities; but in any case the surplus over £10,000 does, and it should have been segregated when the purchase-money was allocated. In *Waldron* v. *Rosslin* (1) there was an express trust to invest.

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(1) 11 Ch. D. 640.

(2) [1913] I. R. 292.

(3) [1915] 2 Ch. 264.

A. V. Matheson, for Henry Wood-Martin and the said Joseph Patrick Cullen, as trustees of the settlement.

Garrett Walker K.C., in reply :—

We claim that the entire moneys in the trustees' hands were real estate at the time of the testator's death, and passed under the devise in testator's will. Quoad the £10,000, there cannot be any real doubt; and Mr. Murphy practically admitted our right. We have both the settlement and the Settled Land Acts, and their effect on the sale under the Land Purchase Acts. *In re Marley* (2) and *Steele* v. *Steele* (3) are distinguishable, because the proceedings were not finished before the death of testator in those cases. There could be no question but that there was an ademption if the purchase-money had come into the pocket of the testator, but it did not. The testator could have got the money for himself if he had so wished, but he left it in the hands of the trustees. Capital moneys will pass under words devising lands: *In re Cleveland's Estate* (4).

O'CONNOR M.R. [His Honor, having stated the facts as above set out, proceeded :—]

The question to be determined is what are the rights of the widow against the fund representing the proceeds of the sale of the lands? Had she any right against them except that of receiving her jointure annuity of £300? It has been contended by counsel for the Attorney-General, in the interest of the charities, that the proceeds of the sale of the lands passed under the bequest of the residue of the testator's property, subject only to the claim on foot of the jointure, the devise of the land having been adeemed by the sale thereof during the testator's lifetime. The subject-matter of the devise had disappeared before the testator's death. The devise had, therefore, nothing to operate on, and so necessarily failed. In the present case the failure was complete, because this is not a case of equitable conversion of land into money by force of a contract of the testator, the land remaining the legal estate. There was an actual legal conversion by conveyance of the lands and payment of the purchase-money. It seems to me that there is only one way of meeting this case, and I must see whether this way is open. If it is shown that it was the intention of the testator, as expressed by his will and codicils, that not merely the lands but the proceeds of the sale of the lands, if sold during his life, should be held upon the trusts declared concerning the lands, then the trusts attach to the purchase-money. There was no doubt an ademption of the devise; but was there an ademption of the trusts attached to the purchase-money? It is a question of construction. Now what does the will do? It devises the lands upon trust for sale with a direction to invest the proceeds; and the testator directed his trustees to pay the rents until sale, and the income of the fund after sale to his wife during her widowhood. Stopping here, it would certainly be a strange operation under which a testator, by himself carrying out a sale which he had directed his trustee to carry out for certain purposes, should defeat those purposes. Does a testator by simply anticipating the performance of a trust defeat the whole trust? I have looked through the books for any case in which there was a devise of lands upon trust for sale with trusts declared as to the proceeds where it was held that the trusts failed by reason of a sale by the testator himself. I have not been able to find one, and I should have been surprised if I did, because in a case like this, not merely is there a devise of the lands, but there is in substsnce a bequest of the proceeds. The lands may go, but the proceeds may remain for the will to operate upon. But of course there may be an ademption of the proceeds; for instance, by an appropriation by the testator of the purchase-money, either by spending it, or mixing it up with his general assets. There was no such appropriation here, because the testator has left the money in the hands of the settlement trustees.

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(1) 11 Ch D. 640.

(2) [1915] 2 Ch. 264.

(3) [1913] 1 I. R. 202.

(4) [1893] 3 Ch. 244.

I think also that the execution of two codicils—the first after one portion of the estate was agreed to be sold, and the second when practically the entire estate was agreed to be sold, by which he confirmed his will in all respects, other than those particularly mentioned—must be regarded as a confirmation of the trusts of the proceeds of the sales which the testator had himself effected.

For these reasons I am satisfied that there was no ademption of the trusts declared by the will, and, in my opinion, the testator's widow is entitled during her widowhood to the income of the entire fund.

Mr. Wilson on her behalf relied also upon sect. 22, sub-s. 5, of the Settled Land Act, 1882, which enacts that capital money arising under the Act while remaining uninvested and unapplied, and the investments thereof, shall for all purposes of disposition, transmission, and devolution be considered as land, and the same shall be held for and go to the same persons successively in the same manner, and for and in the same estates, interests, and trusts as the land wherefrom the money arises would if not disposed of have been held and have gone under the settlement. But it was held in *In re Moses, Beddington* v. *Beddington* (1), that the Settled Land Act had no bearing upon a question such as we have here — that the question is as to the construction of the will—what did the testator intend to dispose of? Did he intend to dispose of the property in specie and in its character as land, and in that only, or did he intend to declare trusts which should attach to the property in the form it then had, or in any form it should assume? I have had no difficulty in answering that.

Solicitors for the plaintiffs, the trustees of the will, and also for Mrs. M. E. Gilfoyle, as beneficiary: *Milward, Jones, & Cameron.*

Solicitors for the trustees of the settlement: *Gordon & Son.*

Solicitor for the Attorney-General: *William C. Gage.*

R. R.

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(1) [1902] 1 Ch. 100.

Appeal.
1920.
Nov. 11.

M'DERMOTT'S ESTATE (1).

Renewable lease—Lease for lives—Lives dropped—Equitable right to renewal—"Adequate compensation"—Tenantry Act (19 *&* 20 *Geo.* 3, *c.* 30, *Ir.*).

The "adequate compensation," on payment of which, under sect. 1 of the Tenantry Act (19 & 20 Geo. 3, c. 30, Ir.), Courts of Equity are empowered to give relief against lapse of time to tenants who have failed to pay renewal fines, is equivalent to full compensation.

Held accordingly, reversing the decision of Ross J. ([1920] 1 I. R. 257), that it is not competent for the Court, in the exercise of its judicial discretion, to limit the amount of arrears of interest due by a tenant in respect of renewal fines.

Appeal.

By a lease for lives renewable for ever, dated July, 1707, lands in Co. Mayo were demised by Arthur Shaen to James Wallace, at a yearly rent of £10, with 10*s.* receiver's fees, and a fine of £10 for renewal on the fall of each life. Subsequently the lessor's interest was divided into two moieties, with separate renewals as to each, one moiety being vested in Mr. Shaen Carter, the other in Miss Violet Knox. The lessee's interest became vested in Joseph G. M'Dermott, the vendor. The last renewal in respect of Mr. Shaen Carter's moiety was made in 1872, and the cestuis que vie therein named died, or were presumed to have died, 69, 43, and 32 years ago respectively. The head-rent of £5 and all future fines payable out of this moiety had been redeemed for a sum of £96 odd. It was admitted that a sum of £105 was owing for fines accrued due; and the total amount of such fines to the date of allocation came to £107 12*s.* 7¾*d.* No renewal or fee-farm grant was ever taken out, nor were any fines paid or demanded up to 1917. The vendor objected that Mr. Shaen Carter was not entitled to interest on the fines for the full period. By his order, dated the 2nd July, 1920, made on the ruling of the Final Schedule of Incumbrances (2), Ross J. allowed six years' arrears of interest only, in respect of each renewal fine. Hence this appeal.

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(1) In the Court of Appeal, before Sir James Campbell C., and Ronan and O'Connor L.JJ.

(2) [1920] 1 I. R. 257.

S. L. Brown K.C. and *Macrory*, for the appellant:—

The learned Judge should not have limited the amount of compensation as he did. Prior to the Tenantry Act (1), when a lessee had any equity to renew, there being no fraudulent intent to avoid payment of fines, and no answer to the demand for a renewal but lapse of time, he always obtained relief from a Court of Equity, but on the terms of doing equity, namely, paying all fines and interest. The covenant on the tenant's part was to do all those acts which he agreed to perform: *Bateman* v. *Murray* (2). "Adequate compensation" in sect. 1 of the Tenantry Act means full compensation, as shown by the use of the latter words earlier in the clause. In *O'Hara* v. *Bourke* (3) the plaintiff was declared entitled to a renewal on payment of "the rent, arrears of rent, fines, and interest for the fines." See also *Foster* v. *Lord Massereene* (4); *Jackson* v. *Saunders* (5).

H. Wilson K.C., for the respondent:—

I admit that prior to the Tenantry Act the tenant was only entitled to relief against forfeiture on doing equity, which may have included payment of all renewal fines and interest. The Tenantry Act, however, did not merely legalize this practice. If

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(1) 19 & 20 Geo. 3, c. 30, Ir. (1), provides:—

"Whereas great parts of the lands in this kingdom are held under leases for lives with covenants for perpetual renewals upon payment of certain fines . . . and whereas from various accidents and causes such tenants, and those deriving under them, have frequently neglected to pay or tender such fines within the times prescribed by such covenants after the fall of such lives respectively; . . . and whereas it has been for a long time a received opinion in this kingdom . . . that Courts of Equity would in such cases relieve against the lapse of time upon giving an adequate compensation to the persons to whom such fines were payable, or their representatives: and to the end that such interests may not be defeated by a mere neglect, where no fraud appears to have been intended, upon making full satisfaction to the lessors, or those deriving under them: be it declared and enacted by the King's most excellent Majesty . . . that Courts of Equity upon an adequate compensation being made shall relieve such tenants and their assigns against such lapse of time, if no circumstances of fraud be proved against such tenants or their assigns," &c.

(2) 1 Ridg. 187, at p. 201.

(3) Lyne on Leases: App. Cas. 4, p. xii.

(4) Lyne on Leases, App. Cas. 12, p. 47.

(5) 2 Dow. 437.

Appeal.
1920.
M'DERMOTT'S ESTATE.

this had been the intent of the Legislature, the wording of the statute would have been different. What is provided is that relief shall be given by Courts of Equity "upon an adequate compensation being made," these words being substituted for the words "full satisfaction to the lessors," used earlier in the section, and it is submitted that these words confer jurisdiction on the Court of Equity in each case to determine what is "adequate compensation."

SIR JAMES CAMPBELL C.:—

We are all agreed that the words of this statute are too strong to enable the limited construction adopted by Ross J. to be placed upon the words "adequate compensation." Had the clause merely provided that the lessee should be entitled to relief on payment of adequate compensation, it might well have been held that it was left to the discretion of the Judge in each case, having regard to the circumstances and facts, to arrive at the true measure of such compensation. It is impossible, however, to leave out of consideration the previous words of the preamble, on which Mr. Brown has properly laid stress,—"and to the end that such interests"—that is, the interests of the tenants—"may not be defeated by a mere neglect, where no fraud appears to have been intended, *upon making full satisfaction* to the lessors." In view of these words, we are driven to the conclusion that the words "adequate compensation" in the enacting portion of the clause are equivalent to the foregoing words, "full satisfaction," and that the limited construction put upon these words by Ross J. cannot be upheld. This construction is in accordance with what appears to have been the unbroken course of procedure and authority during a lengthy period of years; and, in the absence of any authority to the contrary, we are bound to give full effect to what we consider to be the true meaning of the words "adequate compensation." The appeal will accordingly be allowed.

RONAN and O'CONNOR L.JJ. concurred.

Solicitors for the appellant: *Reeves & Son.*
Solicitors for the respondent: *Gore & Grimes.*

R. ST. J. C.

WARD *v.* WARD (1).

(1920. No. 442.)

Appeal.
1920.
Dec. 15.
1921.
Feb. 7.

Will—Estate in realty—Devise to J., "with remainder to her and her children for ever"—"Children" a word of limitation.

A testatrix devised real estate to her son T. during his natural life, and, in case of no lawful issue by him, to her daughter J., "with remainder to her and her children for ever." At the date of the will and of the testator's death there were seven children of J. living. T. died unmarried, and J. died intestate.

Held (affirming the Master of the Rolls, Ronan L.J. dissenting), that the word "children" as used in the will was a word of limitation, and that J. took an estate tail general.

APPEAL from an order of the Master of the Rolls dated the 22nd June, 1920. The matter came before the Court on a summons asking that certain questions arising under the will of Mary Anne Mahon, made on the 11th May, 1881, should be determined. By the said will Mary Anne Mahon devised fee-simple lands in Gurteen, Co. Galway, "to my son Thomas Mahon during his natural life, and in case of no lawful issue by him I bequeath my estate to my daughter, Julia Ward, with remainder to her and her children for ever."

The testator died in 1881, leaving her surviving Thomas Mahon, an only son, and Julia Ward, an only daughter. Thomas, who entered into possession as tenant for life, died on the 20th January, 1920, unmarried. At the date of the will, and at the time of the testator's death, there were seven children of Julia Ward living, viz., Thomas, Lewis, Mary, Kathleen, Julia, Bridget, and Dora. These were all living at the death of Thomas Mahon. Julia Ward died on the 6th May, 1906, intestate, and without having made any appointment of the lands. The defendant, Thomas Ward, was the eldest son of Julia Ward, and he claimed to be entitled to the property as heir-at-law. A summons was taken out by Lewis Ward, Mary Ward, and Kathleen Murray, who claimed to be devisees and beneficiaries under the will, asking for the determination of the following questions:— 1. What (if any) estate did Julia Ward take in the said lands upon the death of Thomas Mahon without his having had any lawful issue? 2. What (if any) estate did any and which of the children of the said Julia Ward take in the lands upon the death of the said Thomas Mahon as aforesaid, and on the death of Julia Ward, or otherwise, under the said will? The Master of the Rolls held that, on the true construction of the will, Julia Ward, the mother of the plaintiffs and the defendant, took, upon the death of Thomas Mahon, an estate in tail general in the said lands. His Honour construed "children" as a word of limitation, and not of purchase. The plaintiffs appealed.

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(1) Before SIR JAMES CAMPBELL C., and RONAN and O'CONNOR L.JJ.

Phelps, for the appellants:—

I submit that Julia Ward took an estate for life, with remainder to herself and her children as joint tenants. The principle of *Wild's Case* (1) is that the word "children" is not prima facie a word of limitation. *Roper* v. *Roper* (2) is an authority against the appellants; but that case is distinguishable on the ground that no child of the devisee was born at the time of the testator's death. [Other authorities cited: *Byng* v. *Byng* (3); *Davie* v. *Stevens* (4).]

The defendant was not represented.

1921.
Feb. 7.

SIR JAMES CAMPBELL C.:—

Mary Anne Mahon, by will dated 11th May, 1881, devised her estate known as Gurteen to her son Thomas Mahon during his natural life, and in case of no lawful issue by him, to her daughter Julia Ward, with remainder to her and her children for ever. Thomas Mahon had no lawful issue, and upon his death the estate passed by the devise to Julia Ward, the question for decision being as to the nature and quality of this estate; or, in other words, whether Julia Ward was entitled to an estate tail, or to an estate for life only, with remainder to herself and her children as joint tenants. I think the authorities establish that the words "and his children," following upon a devise to A, are words of purchase and not of limitation, especially when A has children living at the date of the will; but even in such a case it has been sometimes held upon the language and its context that they were words of limitation. In *Roper* v. *Roper* (1) it was held in the Common Pleas that a devise by A to his wife for her natural life, and after her decease to his daughter, to her and her children for ever, conferred an estate tail on the daughter, even though she was enceinte of a daughter at the date of the will and of the death of the testator. Willes J., who gave the judgment of the Court, held in effect that it was the duty of the Court to give effect if possible to all the words of the bequest, and that the words "to her" would be surplusage if the sentence "to her and her children" was treated as one of purchase, the intention of the testator apparently being that the children should take through the mother. This decision was affirmed in the Exchequer Chamber (2) upon two grounds—first, that the testator could not be supposed to have intended that the unborn child was to be the immediate object of the devise jointly with the mother, and that in any event one child could not satisfy the word "children"; and, second, on the ground put by Willes J.

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(1) 6 Co. Rep. 16*b*.
(2) 36 L. J. C. P. 270.
(3) 10 H. L. C. 171.
(4) 1 Doug. 32.

In the present case the question is made complicated and difficult by reason of two considerations that were absent in *Roper* v. *Roper* (1)—first, the fact that Julia Ward had seven lawful children living at the date of the will and of the death of the testator; and, second, that the gift to her and her children for ever is by way of remainder. Upon the whole, I have come to the conclusion, after considerable doubt, that I ought not to dissent from the decision of the Master of the Rolls, mainly in consideration of the fact that Julia Ward could only benefit in possession by this remainder in the event of her surviving all her children—a contingency so remote that I agree with the Master of the Rolls in thinking it was never within the contemplation of the testatrix, and that her real intention to be inferred from the entire will was, as held in *Roper* v. *Roper* (1), that the children should take through their mother, and that the estate should follow on the line of her issue.

(1) 36 L. J. C. P. 270.

(2) L. R. 3 C. P. 32.

RONAN L.J.:—

In this case we have to construe what must be taken to be a doubtful will. I take the following passage from the judgment of Lord Hatherley in *Clifford* v. *Koe* (1) as defining the duty of the Court. It is peculiarly appropriate, as the case was one dealing with the rule in *Wild's Case* (2):—"I apprehend, my Lords, that a Court of Justice in endeavouring to ascertain the intention of a testator in a will which may admit, when brought into contact with the surrounding facts, of some doubt and difficulty, will always do two things. In the first place, it will do what is somewhat quaintly called place itself in the testator's armchair, that is to say, it will see what was the existing state of the family and of everything connected with the property which may have a bearing upon the subject, and then consider the words of the bequest. And, in the second place, it will consider whether or not those are such words as have a fixed and determined intent imputed to them wheresoever they occur in a will, unless some contrary argument can be derived from the construction of the will, and the circumstances connected with the property, and the position of the family."

As to the first matter, the testator at the date of the will had two children—a son Thomas, who never had issue, and has died; a daughter, Julia Ward, who at the dates of the will and of the death of testatrix had seven living children; the defendant, Thomas (the eldest son), and the plaintiff, Lewis, and five daughters, the plaintiffs, Mary and Kathleen, and three others. Julia Ward died in 1906; Thomas Mahon in 1920. The will was made in 1881, and the testatrix died in the same year or shortly after. As to the second matter referred to, we have really only to deal with five lines of the will. They contain such words as are referred to by Lord Hatherley, viz., "estate," "issue," "remainder," "for ever"; and phrases, viz., "in case of no lawful issue by him;" "to my daughter with remainder to her and her children for ever." The "imputed" intents referred to are to be ascertained by reference to the rules of construction applicable to each word and phrase. Testators constantly use the same

(1) 5 A. C. at p. 462.

(2) 6 Co. Rep. 16*b*.

ambiguous or doubtful expressions. It is to meet such cases that we require the assistance of rules of construction. Only those who have had to advise on the construction of wills know the advantage of these rules. By their assistance counsel are enabled to advise parties as to their rights in a vast number of cases in which it would be impossible to do so without them. But this depends on the assumption that the Courts will follow the imputed meanings unless a will shows with certainty that the rule should not be followed. As Sir W. Page-Wood (afterwards Lord Hatherley) says in *Almack* v. *Horn* (1): "Nothing is more mischievous than to depart from the settled legal meaning of words unless there is something in the instrument which absolutely requires that you should do so."

Wild's Case (2) is the basis of the rule of construction with which we have mainly to deal here. It is curious that the devise there resembles that in the present case more closely than any other case. We must bear in mind that now the rule is: "In devises of real estate issue is, prima facie, a word of limitation, and equivalent to heirs of the body" (Hawkins, 189). Here we have gifts to Thomas and Julia; the gift to Julia only to take effect if the gift to Thomas fails. But for the Wills Act the gift to Thomas would have given him an estate tail, the word "issue" being taken in accordance with the rule. In *Wild's Case* (2) the first devise was "to A for life, remainder to B and the heirs of his body"; then came the devise in question, "remainder to W. and his wife, and after their decease to their children." Here it is "to Julia, with remainder to her and her children for ever." If we omit—1, the fact that the tenant for life was included in the class to whom the remainder is given, and, 2, the words "for ever," the cases are identical; the words of limitation in the first devise in each case: "heirs of the body" in one, the equivalent "issue" in the other; the word of purchase: "children" in the devise in both cases; the separate gift to the parent, followed by the separate gift to the children in both. The principle of the decision in *Wild's Case* (2) is that at Common Law the primary meaning of such words is "an estate for life, the remainder to their children for life, thence it follows that the intent and not the words only of the devisor ought to make it an estate tail in this case. Then this intent ought to be manifest and certain and so expressed in the will; and in this case no such intent appears; for, peradventure, his meaning was to agree with the rule of the law"; that is the ordinary legal effect of the words used.

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(1) 1 H. & M. 630, at p. 635.

(2) 6 Co. Rep. 16*b*.

This statement as to the necessity that the intent should be manifest and certain in the case of the estate tail is very important. That it is still the law appears from the judgment of Wood V.-C. in *Webb* v. *Byng* (1): "The real rule in that case [*Wild's Case* (2)] being that it is lawful, as Lord Hardwicke puts it, to construe the word 'children' as a word of limitation where the will necessitates such a construction." I shall now read the entire resolution in *Wild's Case* (2). [His Lordship read the resolution.] I refer specially to the words "but if a man devises land to A and to his children or issue, and they then have issue of their bodies, there his express intent may take effect according to the rule of the Common Law, and no manifest and certain intent appears in the will to the contrary. And therefore in such case they shall have but a joint estate for life."

I may point out that the word "issue" does not occur in the will in *Wild's Case* (2), but does in the statement of the rule. It seems that "issue" was taken then as equivalent to "children." It does not seem that the rule that the word "remainder" carried the fee was then established. There seems some suggestion of doubt in the judgments in *Roper* v. *Roper* (3) as to whether it is settled that a devise to A and his children, where he had children at the date of the will, gives a joint tenancy to him and his children. If there ever was any doubt as to this, *Clifford* v. *Koe* (4) puts an end to it. It is an express decision on the point. Lord Hatherley says, at pp. 462-3:—"Now, my Lords, it has been settled for about 300 years that if on reading a will you find these words, 'I give to A and his children my estate and property,' and so on, then prima facie, if you make no inquiry at all about the state of the family of the donee and the devisee, and assume that there was a family in existence at the date of the will, those words in themselves mean a gift to the parent and the children as either joint tenants or tenants in common, as the case may be, according to the construction of the other words of the will. But if you find on inquiring into the state of the family that there was no child whatever of A in existence at the time of the will being made, then, in order that the children who may come into existence (their parents being alive) may have some share of the interest which was evidently intended in some way or other to reach them, you, in such a case, according to the rule which has been established for 300 years, interpret the words as being a limitation to the parent for life with remainder to the children successively, so that each of them shall have his chance in his turn of taking the property." See also Lord Selborne at p. 453. The fact that since the Wills Act a simple gift to A carries the fee makes no difference in the application of the rule in *Wild's Case* (1). See the judgment of Lord Blackburn at pp. 467–8.

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(1) 2 K. & J. 669, at p. 674.

(2) 6 Co. Rep. 16*b*.

(3) 36 L. J. C. P. 270.

(4) 5 A. C. 447.

When *Wild's Case* (1) is carefully read, it will be seen that at the root of it lies the rule of the Common Law that an immediate devise to a person not in existence at the date of the will is void: 6 Cruise's Digest, p. 14. Therefore, a gift to A and her children, where she has none at the date of the will, is void as to the children. To avoid this result in such a case, the Court substitutes for children "heirs of the body." But if she has children the gift is valid, and takes effect according to the ordinary meaning at Common Law of the actual words themselves. "And a devise to a person not in existence at the time when the will is made . . . may be good by way of remainder or executory devise": 6 Cruise's Digest, p. 15.

The gift here is to Julia (having children), with remainder to her and her children for ever. If the gift had been "to her and her children," or to her with remainder to her children, the limitations could take effect in their ordinary sense—a joint tenancy in the one case; a gift to her for life with remainder in fee to the children. There are, as I have already said, two additional matters in the present case—1, the fact that the tenant for life is included in the class who take the remainder; 2, the words "for ever." Do these circumstances justify the Court in substituting heirs of the body for children in the case of a devise which can operate in its ordinary sense according to the Common Law? I shall now deal with the former. There can be no doubt that the inclusion of the tenant for life in the class to take in remainder is unusual. Is there any other objection to it? It is clear and unambiguous. Why should effect not be given to it? When properly construed and proper legal effect given to it, is there anything to justify not giving effect to it? Let us see how it operates, and how far, if at all, it defeats the probable intention of testatrix as compared with the construction contended for by the respondents.

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(1) 6 Co. Rep. 16*b*.

It is plain that the testatrix intended that Julia should have the whole for life, and that Julia's children were to have some interest after her death. The two constructions are—1, estate tail in Julia; 2, Julia, for life remainder to her children in fee as joint tenants, assuming that the devises allow the provisions of the will to stand and take effect. Suppose in the one case the estate tail not barred, and in the other the joint tenancy not severed, and that all the children survive the mother, as the facts are here, the Courts construe wills according to the estates thereby created, although the law permits the devisee to alter the effect of the dispositions. On the death of Julia, the results of 1 would be that Thomas and his issue would take the whole to the exclusion of the six other children. The result of 2 would be that the seven children would take equally. Can there be any doubt that the latter would carry out the intention, and that the former would defeat it? Assume that some of the children died in Julia's lifetime, then the survivors would take the whole. Assume that Julia exercised her full legal power. In 1 she bars the entail, and thereby acquires the fee, and deprives the children of all interest save what she may choose to give. In 2 she severs the joint tenancy. She thereby only acquires one-eighth, and the remaining seven-eighths remains the property of the children, and she can divide the one-eighth between them as she pleases.

It is obvious that the joint tenancy in the remainder carries out the intention of the testatrix more effectually than a tenancy in common. Testators generally assume that their grandchildren to whom they make gifts will survive their parents. On that assumption the plaintiff's construction carries out the supposed intention.

I shall now refer to a case expressly dealing with the effect to be given to the inclusion of the tenant for life in the class taking the remainder, and how far this is a ground for holding that a rule of construction should not be followed. The remainder was a tenancy in common. In *Almack* v. *Horn* (1) the testator had a daughter A, who had an only child, a daughter B. He devised his real estates to A and B as tenants in common during their joint lives, then to the survivor for life, "and after her decease to all and every the child and children of my said daughter and grandchildren, lawfully to be begotten, as tenants in common in tail." B was the only child of A. B had three children. The question was whether B was entitled to share with her own three children in the remainder after the death of the survivor. It was argued for the three children that the testator, having given her an estate for life, could not have intended her to share with her own children. It was argued for persons claiming under B that the cases cited showed that where there is a gift to A for life, remainder to next-of-kin or relations of testator, A is allowed to take as a next-of-kin or relation. (In addition to the cases cited, there are several others referred to at p. 131 of 2 Jarman, 4th edition.) But the strong argument for the three children was this: the remainder was to "children to be begotten"; that could not include B, who was living at the date of the will. True, there is a rule of construction that children to be begotten includes existing children; but the peculiar character of the present gift is sufficient to exclude the rule, and to give the words "to be begotten" their ordinary meaning, as was done in *Early* v. *Benbow* (2). Page-Wood V.-C. reserved judgment. In his judgment, having stated the facts and the rule of construction, and having distinguished the case of *Early* v. *Benbow* (2), he said: "Nothing is more mischievous than to depart from the settled legal meaning of words unless there is something in the instrument which absolutely requires that you should do so. The only peculiarity in this will is the gift of a life estate followed by a sweeping clause carrying the property subject to the life estate to a class of which (according to strict legal construction) the tenant for life would be a member together with her own children. But, though peculiar, there is nothing in this disposition so extravagant and absurd as to compel me to reject the legal construction of the words. It involves no inconsistency to say that the devisee shall take the whole for life, and that after her death her children shall be let in to share the fee with her." This case decides that where the rule of construction provides that "to be begotten" shall include existing children, the inclusion of the tenant for life solely through this rule in the class is not sufficient to induce the Court to construe the words in their ordinary sense and exclude her. This goes far beyond the present case, which only requires the words to be read in their ordinary sense. I am, therefore, of opinion that the inclusion of the tenant for life in the gift in remainder does not justify the Court in departing from the ordinary meaning and effect of the words.

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(1) 1 H. & M. 630.

(2) 2 Coll. 342.

I shall now consider the effect to be given to the words "for ever." The effect of the words "for ever" in reference to an estate tail was very fully considered by the House of Lords in the case of *Vernon* v. *Wright* (1). The devise there was: "To the right heirs of my grandfather S., deceased, by his second wife, also deceased, for ever." *Mandeville's Case* (2) decided that those words, apart from the words "for ever," gave prima facie an estate tail to the right heir at the time of the death. But what was the question argued? That the words "for ever" were so inconsistent with an estate tail that they converted the estate tail which would have arisen from the earlier words into an estate in fee. This was the question in the case. It was partly argued before the Lords in February. The question was thought so grave that it was adjourned to be heard with the assistance of the Judges. It came on before the Lords and five of the Judges. Four Judges were of opinion that the words "for ever" had not this effect; but no less an authority than Mr. Justice Willes held that the earlier words were not conclusive, and that they were open to two constructions, and he said: "This ambiguity appears to me to be removed by the addition of apt and sufficient words

(1) 7 H. L. 35.

(2) Co. Lit. 26*b*.

of limitation in fee-simple, viz., the words 'for ever,' which being themselves a limitation of the estate in fee-simple, show that the previous words ought to be read in this latter sense as designatio personae only. . . . If this construction should not be adopted, the words 'for ever' are unnecessarily rejected and treated as null." The other four Judges held that the words "for ever" did not enlarge the estate tail created by the previous words into an estate in fee-simple. As Crowder J. put it: "The substance of the limitation exists in the words 'heirs by his second wife,' and the words 'for ever' only import the continued duration of the estate tail." The Lords decided, in accordance with the view of the majority of the Judges, that the previous words were clear, and that the words "for ever" were not sufficient to prevent them operating to create the estate tail or to enlarge that estate into a fee-simple. Lord Cranworth said: "The view of the case taken by Willes J. is entitled to great attention. But I am unable to concur in it. The words 'for ever' would, no doubt, be sufficient, if the context required it, to create an estate in fee; but, considering how very commonly these words are used in connexion with an estate of inheritance, whether in tail or in fee, being, in fact, merely tautologous, I cannot think that they make any real difference." The other Lord present was Lord Wensleydale. He said: "I confess that during the course of this inquiry I have felt that if this had been a discussion of the question for the first time, and I had been called upon first to decide on the meaning of this clause in the will, I should have entertained some doubt as to whether it was not to be distinguished from *Mandeville's Case* (1) by two circumstances: the one that it is a bequest 'for ever,' which imports in fee; and, secondly, that if you construe this to be an estate tail, there will be an intestacy as to the remainders over, which is a circumstance that you ought to avoid in construing wills." . . . [This applies also in the present case.] "However, I cannot say that my notions on that subject have amounted to much more than a doubt in the course of this inquiry, and I hold that you ought not to reverse a careful and elaborate decision of the Court below unless you are satisfied that it is wrong. . . . And when I consider that that

(1) Co. Lit. 26*b*.

judgment has been recognized as being perfectly sound by four Judges out of five who have given their opinion, I certainly cannot consider that my doubts ought to weigh. . . . I think the words 'for ever' may not improperly be applied to an estate tail, though with respect to an estate tail they are not perfectly correct."

Lord Wensleydale was one of the greatest authorities on the construction of wills. His judgments are quoted in every text-book, and referred to in all important cases. It is obvious that on the first hearing he took the same view as Willes J., and that, he and Lord Cranworth differing, they decided to call in the Judges. It is also plain that he would not go further than this on the second hearing, viz., that having regard to the opinion of four Judges, he was not sufficiently satisfied that the judgment was wrong to induce him to reverse it. An estate in fee lasts for ever, and estate tail only so long as the issue last. The expression "not quite correct" seems the farthest he would go. Lord Wensleydale and Willes JJ. were certainly two of the greatest lawyers of the nineteenth century. The case was decided in 1858. It is, of course, of the highest authority. The only question really in the case was the effect of the words "for ever" in connexion with an estate tail. It is the only case I have found in which that question appears to have been really discussed. Having regard to the entire case, I confess I find it difficult to see how in the face of it anyone could attempt to argue that where the prior words did not prima facie create an estate tail, the addition of the words "for ever" would have that effect.

A gift to A before the Wills Act gave a life estate; the addition of the words "for ever" converted it into gift in "fee." Where A had children, a gift to A and his children gave them a joint tenancy for the lives of them and of the survivor. Why the addition of the words "for ever" should not convert this into a joint tenancy in fee, I fail to see. But there are statements in text-books that this addition creates an estate tail in the parents. The books I refer to are Hawkins, Theobald, and Stroud's Dictionary. The last refers to *Vernon* v. *Wright* (1) in this connexion. It is not referred to at all in

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(1) 7 H. L. C. 35.

Hawkins. It is referred to in Theobald, but not in connexion with this matter. It is subsequent to all the cases referred to in Theobald except *Roper* v. *Roper* (1); it is not referred to in that case. There is no statement in Jarman similar to those in the books I have mentioned.

It is stated in Hawkins' second edition, p. 243, that "a devise to A and 'his children for ever,' or to A and 'his children in succession' (*Tyrone* v. *Waterford* (2)) will create an estate tail." The case only deals with the gift in succession. No authority is cited in either edition of Hawkins for the proposition as to the gift for ever. The case cited turned on the construction of a complicated will drawn by the testator himself. Lord Campbell decided the case on the general scheme of the will. Lord Justice Knight Bruce held on the whole will that "children in succession" was a phrase of limitation, p. 628. Lord Justice Turner, on the other hand, said he would give no opinion as to whether "children" was to be considered as a word of purchase or as a word of limitation, p. 629. The case has, in my opinion, really no bearing on this case. It was a decision on a very special will, and the words were wholly different from those in the present case. The absence of any reference to *Vernon* v. *Wright* (3) shows that Mr. Hawkins cannot have considered the matter with his usual care. The statement in the second edition of Hawkins is the same as that in the first. At p. 414 of Theobald, 7th ed., there is the following statement:—"'Children' may be a word of limitation. Thus, 1, a devise to A to hold to him and his children for ever; 2, or to A and his children for ever; 3, or to A and his children lawfully begotten for ever, gives A an estate tail." He refers to four decisions in support of these three propositions, and adds: "In such cases 'children' would seem to be a word of limitation quite independently of the so-called rule in *Wild's Case*" (4). The suggested proposition plainly is that where you have a gift to A and his children, and A has children capable of taking, this is immaterial if the words "for ever" are added; that these words are sufficient to create an estate tail in such a case, and that the distinction taken in *Wild's*

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(1) 36 L. J. C. P. 270.
(2) 1 De G. F. & J. 613.
(3) 7 H. L. C. 35.
(4) 6 Co. Rep. 16*b*.

Case (1) becomes immaterial, the words "for ever" being the material words.

The first case and the most important referred to in Theobald is *Davie* v. *Stevens* (2). It was a devise in these terms: "I also give and bequeath to my son William Stevens, when he shall accomplish the full age of twenty-one years, the fee-simple and inheritance of X to him and his child or children for ever." William had no children at the date of the will. The question was what estate William took. The words "for ever" are not referred to in the argument. Lord Mansfield says: "To give the father an estate in fee would be to strike those words (child or children) out of the will. They must operate to give him an estate tail; for there were no children born at the time to take an immediate estate by purchase." Thus he decides the case on the words, omitting the "for ever." But, as if to prevent any doubt as to this, he adds: "The words" 'for ever,' make no difference, for William's issue might last for ever." This was in 1780. It is obvious from the judgment that he only referred to the words "for ever" for the purpose of showing that they did not affect the estate tail created by the previous words; that they were immaterial. The case was plainly decided on the principles of *Wild's Case* (1): 1, that there were no children at the time, and, 2, that the gift was immediate and not in remainder.

The next case referred to is *Broadhurst* v. *Morris* (3). The devise was "to W. B. and to his children lawfully begotten for ever, but in default of such issue at his decease to the testator's grandson A. B., his heirs and assigns for ever." W. B. had no children at the date of the will or death. Being a case sent from Chancery, the Court gave no reasons for the judgment, so we must look to the argument. Cowling, for plaintiff: "W. B. took an estate tail. . . . If the devise stopped at the words, 'lawfully begotten for ever,' the case would be governed by the rule in *Wild's Case* (1)." He then reads the rule and proceeds: "The addition of the words 'for ever' in this will can make no difference," and cites *Davie* v. *Stevens* (2) on this point. This is the only reference to these words in the arguments, which occupy eight pages. It is plain that Cowling was only contending that

(1) 6 Co. Rep. 16*b*. (2) 1 Doug. 321. (3) 2 B & Ad. 1.

"for ever" did not affect the estate tail created by the prior words.

The third case is *Wood* v. *Baron* (1). In this, the only case of the four in which the parent had a child or children at the date of the will, the devise was as follows [His Lordship read the terms of the devise]. The first thing to note is that the devise is not one of the three mentioned in respect of which the case is cited; 2, there is no direct gift to children at all, only one to the parent to hold same as a place of inheritance to her and them; and, 3, that even this is not "to her children," but "to her children or issue"—a vital distinction, as a devise to A. and her issue gives an estate tail, whether she has children or not. This was also a case from Chancery, and the Court reserved judgment, and gave no reasons. We must, therefore, examine the arguments and statement by Lord Kenyon at the close. "Holroyd, for the plaintiff: A. W. took an estate tail. *Wild's Case* (2) . . . only holds where the estate is given to the children by express words, whereas here the gift is to Anne Wood alone, 'who shall enjoy the same as a place of inheritance to her and her children, &c.' There is, therefore, an express estate of inheritance given to her." He does not refer to the words "for ever." Manley contra: "This case fell expressly within the rule laid down in *Wild's Case* (2), that if a man devise land to A and to his children and issue, and that he have then issue, the issue shall take a joint estate for life with A." [Lord Kenyon observed "that there were other words here, namely, that A. W. should enjoy the estate as an inheritance to her and her children or issue for ever."] This observation is plainly addressed to the argument that only a joint life estate was given. This appears from the next reply of Manley, viz., "If those words were construed to give A. W. a fee, it would make the limitation which follows" [the gift over in default of issue] "an executory devise." [Lord Kenyon: "It would be too remote."] Manley cited *Porter* v. *Bradley* (3) and *Roe* v. *Jeffrey* (4) to show that it would not. Lord Kenyon then expressed his view of the case: "In cases of this sort one spells, as it were, every word in order to get at the real inten-

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(1) 1 East, 259.

(2) 6 Co. Rep. 16*b*.

(3) 3 T. R. 143.

(4) 7 T. R. 589.

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tion of the testator." He then takes the words, not of the devise, but of the gifts over in *Porter* v. *Bradley* (1) and *Roe* v. *Jeffrey* (2), and says they "showed that the testators in the respective instances meant to confine the limitations over to the event of a dying without issue at the time of the death of the first taker. But it is a general uncontrollable rule that that which may take place as a remainder shall never take place as an executory devise; and at present it appears to me that A. W. took an estate tail. However, we will consider the case, and certify our opinion." They certified an estate tail. It seems to me obvious that Lord Kenyon decided the case on the ground that the gift over was on a general default of issue of A. W; the words being "if A.W. should die leaving no child or children, or if A. W.'s children should die without issue"—the latter words clearly import general failure of issue of A. W. I have examined this case minutely as being the only one in which the parent had children at the date of the will. It is, in my opinion, no authority for the proposition that a devise to A and her children for ever gives an estate tail if A has children at the date of the will. The gift is wholly different; it is not direct; it is to her alone, and not to children, but to "children or issue," and the case seems to have been decided on the gift over. There is none in this case. Further, it is not a gift in remainder.

The fourth case is *Roper* v. *Roper* (3), reported in the Common Pleas in 36 L. J. C. P. 270 only; in the Exchequer Chamber in L. R. 3 C. P. 32. It was a case of devise "unto my daughter M., wife of A. R., to her and her children for ever." M. had no child born at the date of the will, but was enceinte. In the Exchequer Chamber the Court held that for the purposes of the rule in *Wild's Case* (4) she must be taken to have had no children at the date of the will, and that, therefore, under that rule, she took an estate tail. The Court, however, also expressed their concurrence in the view taken in the Common Pleas, which apparently treated the case on the basis that M. had a child at the date of the will. There Mr. Justice Willes and the Court decided the case on the ground that the gift was not "to M. and her children" simply, but "to M., to her, and her children";

(1) 3 T. L. R. 143.

(2) 7 T. R. 589.

(3) 36 L. J. C. P. 270.

(4) 6 Co. Rep. 16*b*.

that if they took as joint tenants the additional words "to her" would be surplusage, and he, therefore, treated them as words of limitation, as some effect must be given to them. The Court could not reject them. There are some observations in both Courts which seem to suggest a doubt as to whether a gift simply "to A and her children," she having children, would give a joint tenancy, but, at all events, since the judgments of the House of Lords in *Clifford* v. *Koe* (1), there can be no doubt as to this. The decision of the Common Pleas is entirely based on the words "to her" after the gift to M., and the impossibility of rejecting them. What application can this have to the present case: "to A with remainder to her and her children"? To make it apply, the words "with remainder" must be struck out of the will, or treated as unnecessary. This would be infinitely stronger than striking out the repetition "to her" as not affecting the meaning. The clause as it stands accurately and technically describes a particular estate and a remainder, and the striking out of "with remainder" alters the entire meaning of the words, and is, in my opinion, wholly unjustifiable.

Under the rule in *Shelley's Case* (2), where there is a particular estate of freehold to A., with remainder to the heirs of his body, or in a will to his issue, the operation of the rule (which is one of law and not of construction) is thus described in 6 Cruise's Digest, p. 276: "The estates could not stand together, but the estate left was swallowed up in the estate tail." But paragraph thirty-nine, at p. 290, is as follows: "The rule in *Shelley's Case* (2) does not apply to the words 'sons' or 'children,' and, therefore, a devise to A for life, with remainder to his first and other sons, or to his sons or children, gives A only an estate for life, and his sons or children will take by purchase." That is, those two estates can stand together, and one does not swallow up the other. The unambiguous word "remainder" cannot be struck out, and it establishes that there are two estates given, not one. But, so far as the words "for ever" are concerned, they do not appear to have been referred to in either Court. The Exchequer Chamber based their judgment on the rule in *Wild's Case* (3), where there are no children, and only expressed a general

(1) 5 A. C. 447. (2) 1 Co. Rep. 93b. (3) 6 Co. Rep. 16b.

concurrence in the judgment of the Common Pleas. In the Common Pleas Willes J. was, of course, thoroughly conversant with *Vernon* v. *Wright* (1). He would obviously be the last Judge to hold that the words "for ever" would create an estate tail where it was not created without them by the will.

In addition to these four cases, Mr. Theobald says: "See too *Doe d., Gigg* v. *Bradley*" (2). This was a case of a bequest of a term of years. It is described in Jarman thus: "The word 'children' seems to have been construed as a word of limitation (in a very obscure will)." I do not think it would give any assistance in the case if I attempted to examine this obscure will. The cases cited by Mr. Theobald do not support the proposition suggested by him. They seem to me entirely in accordance with *Vernon* v. *Wright* (1), and none of them even suggests that the words "for ever" can create an estate tail where it would not exist without them. In dealing with the words "for ever," Mr. Stroud says "they are not inconsistent with an estate tail," and refers to Jarman. He adds, "and would sometimes create such an estate": *Wright* v. *Vernon* (3); *Good* v. *Good* (4). Neither of these cases is any authority for this latter proposition. He immediately afterwards correctly states the effect of the former, viz., "added to words creating an entail the phrase 'for ever' is insufficient to enlarge the gift to a fee simple." Here he refers to the case in the House of Lords. In the report in 2nd Drewry, Kindersley V.-C. nowhere suggests that the words "for ever" can create an estate tail which would not have been created without them. All he says is: "Cases, almost without number, occur in which those words are added to limitations of estates tail, . . . the use of the words 'for ever' in those cases (that is, where the preceding words have created the estate tail) only indicating the donor's or testator's intention that the estate is to pass to the whole series of special heirs indicated, continuously and without interruption." *Good* v. *Good* (4) was a devise "to G. to hold unto him, the said G., his heirs lawfully begotten for ever." There was no gift over in default of issue. The words "for ever" are not referred to in argument or judgment. Lord Campbell, giving judgment, said: "The devisor has clearly used apt words for giving an estate tail by limiting the land to a man and his heirs lawfully begotten," omitting the words "for ever." Crompton J. said: "The words of the first limitation have always been considered to give, in a will, an estate tail, and that is clearly assumed by the Court of Exchequer in *Mortimer* v. *Hartley*" (1). The words referred to there were "heirs lawfully begotten," not "for ever." The case is a specific authority that the words without the words "for ever," which are never referred to, created an estate tail. The only question in the case was the effect of the absence of a gift over, which it was contended distinguished the case from the authorities, which had decided that the words without "for ever" created an estate tail. The authorities cited by Mr. Stroud, therefore, wholly fail to establish the proposition for which he cites them. This is very remarkable, as, considering the enormous scope of the work, the accuracy of the dictionary is wonderful. On these words Mr. Stroud was probably misled by the positive statement in Hawkins, to which work he often refers.

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(1) 7 H. L. C. 35.
(2) 16 East, 399.
(3) 2 Drew, 439, at p. 463.
(4) 7 E. & B. 295.

From this examination of the authorities, I am of opinion—1, that a gift to A and his children, where A has children at the date of the will, gives them a joint tenancy in fee; that this is settled beyond question by *Clifford* v. *Koe* (2), even if there had been some doubt as suggested in *Roper* v. *Roper* (3); 2, that the addition of the words "for ever" does not change the gift into one of an estate tail to A. But even if it did, this would not decide the present case. The limitation would still be 1, to Julia; 2, with remainder to her and her children for ever. Surely, it cannot be suggested that the testatrix intended a gift to Julia for life with remainder to her in tail. Even if the proposition in Hawkins and Theobald were law, to make them applicable we should read the will, "To Julia and her children for ever," and strike out of the will the words "with remainder to her." For these reasons I think the appeal should be allowed.

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(1) 6 Ex. 47, 59. (2) 5 A. C. 447. (3) 36 L. J. C. P. 270.

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O'CONNOR L.J.:—

What is the meaning in this will of the words "to her, Julia Ward, with remainder to her and her children for ever"?

That the word "children" in a will has, prima facie, the same sense as in our own ordinary language, namely, issue of the first generation, is well settled in *Wild's Case* (1) and many other authorities; that this prima facie sense may be displaced where the context of the will or the general intention of the testator so requires is equally well settled, this displacement often occurring where there are no children at the date of the will, or, even where there are such children, if the general scope of the will so requires: *Byng* v. *Byng* (2). The words "for ever" may, as I think, according to the context, tend in the direction of an estate tail or of a fee-simple. But I think it is a mistake in construing a clause to take one word or expression and then another word or expression, and by piecing together the primary signification of the one with the primary signification of the other, to say that there you have the meaning of the clause. One must look at the whole clause.

Suppose I use the expression "A and his children for ever" divorced from any context, what should I be taken to mean? Well, I think, most people would say, "A and his descendants." The phrase is frequently so used in the Bible, that great storehouse of the language which flavours and permeates our speech and writing: "For the Lord thy God hath chosen him out of all thy tribes to stand and minister in the name of the Lord, him and his sons for ever." Therefore, as I think, in ordinary language, "A and his children for ever" is, at any rate, susceptible of the meaning, "A and his children ad infinitum," or "A and his descendants." If a testator gives an estate to "A and his children for ever," this may mean, in my opinion, either that he gives the estate for ever to A and his children, or that he gives the estate to A and his descendants; and which of the two meanings is correct seems to depend on the context.

In this case I think the testator meant "to her and her descendants," for I think the other alternative attributes to the testator a very far-fetched intention indeed. To give Julia Ward a life estate, with remainder to herself and her seven children as joint tenants, is to give her something which she could not possibly enjoy unless in the event of the seven children taking nothing; in other words, in the event of the seven children dying before her. It is, of course, true to say that the joint tenancy could be severed in Julia Ward's lifetime. She would thus get a life estate, with a one-eighth as tenant in common in remainder; but surely one can hardly attribute that intention to the testator, having regard to the terms of the will.

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(1) 6 Co. Rep. 16*b*.

(2) 10 H. L. Cas. 171.

Being, therefore, of opinion that this will should be construed as if it read "with remainder to her and her issue," I am of opinion that the Master of the Rolls was right, and that the appeal should be dismissed.

Solicitor for the appellants: *M. Noyk.*

C. L.

M. R.
1921.
March 16, 23.

IN THE MATTER OF A CONTRACT MADE BETWEEN ELLEN WHITE AND WILLIAM HAGUE, AND IN THE MATTER OF THE VENDOR AND PURCHASER ACT, 1874.

WHITE v. HAGUE.

(1921. No. 196.)

Vendor and Purchaser—Condition of sale—Sale of land purchased under Land Purchase Acts, registered under Local Registration of Title (Ireland) Act, 1891*—Condition of Sale precluding purchaser from inquiry as to equities—Unreasonable condition—Purchase of Land (Ireland) Act,* 1885 (48 *&* 49 *Vict. c.* 73), *s.* 8*—Land Law (Ireland) Act,* 1887 (50 *&* 51 *Vict. c.* 33), *s.* 14, *sub-s.* 3.

A tenant who had purchased her holding under the Irish Land Purchase Acts was registered as owner in fee-simple under the Local Registration of Title (Ireland) Act, 1891 (54 & 55 Vict. c. 66), subject to the rights or equities (if any) arising from the interest thus acquired being deemed to be a graft on her previous interest. On a sale of the lands the conditions of sale provided that the vendor should be deemed to have a good and sufficient title and power to assign the premises, and precluded any requisition as to evidence of title other than a copy of the folio. The conditions further provided that the title of the vendor prior to the date of registration should not be investigated.

Held, that the conditions of sale were confused, contradictory, and misleading, and that the purchaser was entitled to be relieved from his contract.

When the root of title itself embodies a restriction or incumbrance—not by mere recital, but in its operative part—a requisition that the restriction or incumbrance shall be shown not to affect the lands is not in itself an inquiry into the prior title, but into the title derived from the root put forward.

VENDOR AND PURCHASER SUMMONS for a declaration that the purchaser's requisitions on title had not been sufficiently answered, and that good title had not been shown to the lands agreed to be sold in accordance with the contract of sale, and that the conditions of sale were unreasonable and against the right of the purchaser to know and the duty of the vendor to disclose the title, and that they were not binding on the purchaser; and, further, that the vendor was bound to furnish a statement of his title, notwithstanding the said conditions.

The property consisted of a farm of land in County Cavan, containing 52A. 1R. 33P. statute measure, held in fee simple by the vendor, Ellen White, subject to an annuity of £18 4*s*. 8*d*., payable to the Irish Land Commission. The lands were put up for sale by auction which fell through, and were subsequently purchased on February 8th, 1921, for £1,450, by William Hague, subject to conditions of sale which provided—

No. 4. That the vendor shall not furnish nor shall be required to furnish any abstract of title to the premises sold, but shall be deemed to have a good and sufficient title and power to assign the premises.

No. 4*a*. The vendor is registered pursuant to the Local Registration of Title (Ireland) Act, 1891, as owner of the said lands, being the lands comprised in folio No. 12,669 of the Register of the County of Cavan. No abstract or other evidence of title shall be furnished to the purchaser other than a plain copy of the said folio, and beyond this the purchaser will not be entitled to any other document of title, or be entitled to serve any objections or requisitions in respect thereof. The lands were purchased under the provisions of the Land Purchase Acts, and were registered in the vendor on the 8th day of January, 1921, subject to the rights or equities (if any) arising from the interest acquired by the purchaser under those Acts, being deemed to be a graft upon his previous interest therein. The purchaser shall not require the note as to the rights or equities (if any) so arising to be discharged from the register, nor shall the title to the previous interest of the purchaser under the Land Purchase Acts be called for or investigated, and the purchaser shall not be entitled to serve any objections or requisitions in respect thereof. And the title of the vendor prior to the said 8th day of January, 1921, shall not be called for or investigated, and the purchaser shall not be entitled to serve any objections or requisitions in respect thereof. The original land certificate is in possession of the Land Commission, subject to whose charge the lands are sold. The purchaser shall not require the production or delivery of the said certificate or a copy thereof.

No evidence shall be required of the existence or non-existence of any of the burdens declared by sect. 47 of the Local Registration of Title (Ireland) Act, 1891, to affect registered land without registration; but the purchaser shall assume that the property is free from all such burdens except as appears in the particulars of sale or the said folio.

No. 7. The purchaser shall not call upon vendor to discharge the equities, nor shall the purchaser require the rights or equities (if any) appearing on the folio or register to be discharged from same, and shall buy and be presumed to have purchased subject to such rights or equities (if any).

No. 10. That in case the purchaser or his solicitor shall, within ten days from the day of sale—and in this respect time shall be deemed to be of the essence of the contract—make to the vendor or his solicitor any proper objection to the title, which the vendor shall be unable or unwilling to comply with, the vendor shall be at liberty to rescind the contract for sale by repayment to the purchaser of the amount of his deposit, without interest, costs, or other charges; and any objection not made within that period shall be taken to be waived.

The only documents furnished to the purchaser's solicitors were the conditions of sale and a copy of the folio. No. 12,669 of the register of Co. Cavan. On the 10th February, 1921, the purchaser's solicitor wrote objecting that a good title had not been shown, and requiring a proper abstract of title to be furnished, deducing title for at least twenty years, and showing how the vendor became entitled to the lands. To this letter the vendor's solicitor replied, "The purchaser is not entitled to make this objection. (See condition 4*a* of the Conditions of Sale.)"

The following requisitions were then sent by the purchaser's solicitor :—

1. The Conditions of Sale respecting the title are against the common right of a purchaser to know what title the vendor is offering. She may be only a trustee, inasmuch as the conditions do not disclose any beneficial title in her, nor does the copy folio furnished; the purchaser requires a proper abstract of title.

2. Having regard to the amount of the purchase-money, and to the ordinary duties of a vendor to state what is the nature of the title offered, the purchaser will, unless his reasonable requisitions are complied with, take such steps as he may be advised to have it declared that these conditions are unreasonable and not binding, or for such other remedies as he may be declared entitled to.

To which the following replies were given :—

1. The Conditions of Sale clearly set forth the title which the vendor offered and the purchaser accepted. The vendor is unaware of any rights, common or otherwise, of a purchaser which would entitle him to disregard at his will the clear and unambiguous terms of a contract by which he has bound himself. The vendor, therefore, refuses to furnish a twenty years' abstract as required.

2. The amount of the purchase-money has no bearing on the terms of the contract as to title. The ordinary duties of the vendor are to carry out the terms of the contract entered into by her. These duties she is willing to perform, and to comply with any requisitions which the purchaser may be entitled to make under the terms of the contract.

The present summons was then issued.

Herbert Wilson K.C. (with him *T. J. Smyth*), for the purchaser.

FitzGibbon K.C. (with him *Finlay*), for the vendor.

O'Connor M.R. :—

The summons in this case has been taken out under the Vendor and Purchaser Act by a purchaser for the purpose of getting a decision whether he is bound to accept the title which has been offered by the vendor. The difference which has arisen between the parties suggests questions of far-reaching importance and difficulty.

The property agreed to be sold is a farm lately purchased by the vendor under the Land Purchase Acts, and vested in her in fee simple by the Land Commission, subject to a land purchase annuity. This title was registered in the name of the vendor under the Local Registration of Title Act, subject to equities (if any), and so it remains registered, as appears by the appropriate folio in the Registration of Title Office. The purchaser has agreed to buy it for the sum of £1,450, and he has required from the vendor an abstract of title which will show that the lands are not subject to any equity which will affect the purchaser's title when acquired by conveyance. This requisition has been met by the answer (I am stating it as put forward by learned counsel for the vendor in the course of the argument) that the sale was subject to conditions which preclude the purchaser from making any inquiry as to equities or into the title of the vendor previous to the registration thereof, and that the only evidence of title which she is bound to give is the folio as it stands. I will assume for a moment that the agreement is subject to the conditions as so stated, and I will endeavour to determine the position in which it would place the purchaser. By sect. 14, sub-s. 3, of the Land Law (Ireland) Act, 1887, "any person in occupation of and paying rent for a holding which is held under a contract of tenancy shall have power to enter into an agreement for the purchase thereof. Where a holding shall be conveyed to or vested in any such person, the interest thereby assigned to him shall be deemed to be a graft upon the previous interest of the tenant in such holding, and shall be subject to any rights or equities arising from its being such graft." The first observation to be made on this enactment is that it is wider in its scope than the proviso in the 8th section of the Purchase of Land (Ireland) Act, 1885, which also made the newly acquired estate a graft upon the previous interest, but only in the case of the purchaser being also the tenant of the holding purchased.

The section in the Act of 1887 extends the graft provision to the case of a person who may not be a tenant, but who is in occupation of and pays rent for a holding which is held under a contract of tenancy. The object of the extension is obvious. It was to provide for the case of a person who was in occupation of a holding, but was not entitled to the tenancy—a case not provided for by the Act of 1885, and one in which, were it not for the extension in the Act of 1887, an injustice would be done to the true owner of the holding by the fortuitous circumstance of a stranger being in occupation. I call attention to this because the result becomes at once apparent that the purchaser of a holding under the Land Purchase Acts may have no beneficial interest whatever and no disposing power over it. Here there is a most serious infirmity of title, against which every purchaser dealing with a vendor of land bought under the Land Acts has to seek for protection in an investigation of the title prior to the vesting order or fiat of the Land Commission. There is another consideration which makes that investigation absolutely essential. The ordinary case of graft springs out of a constructive trust which it is sometimes difficult to fasten on the person whom it may affect. The trust has not been declared, and it may not be so apparent as to bind a purchaser from the constructive trustee. But the graft which springs from a Land Commission sale is not dependent on a constructive trust. It is expressly declared by statute, and the trust is as clearly established as if the purchaser by deed under his hand declared that he held the lands purchased upon the same trusts and to and for the same purposes as the previous tenancy had been held for. A purchaser from him is therefore in the strongest way coerced to make an inquiry into the title of his vendor previous to the Land Commission sale. Of course, I am only dealing with cases in which the title has been registered subject to equities (if any).

I must now point out the possible result of taking such a title without investigation. The purchaser might get absolutely no beneficial interest, because his vendor might have had no interest in the tenancy of the purchased holding, for he might have been a mere occupier without any title; or the purchaser might get only a limited interest—such as for the life of his vendor if the latter had been only tenant for life of the holding before it was sold in the Land Commission Court; or the purchaser might get only an undivided share if his vendor's interest in the holding had been that of one of numerous next-of-kin.

It is, therefore, obvious that under an open contract the purchaser would be entitled to a full investigation of title. It is, however, no less obvious that the right to a full investigation may be cut down by conditions of sale.

So far there is no difficulty, but we are driven to consider whether it is permissible, and, if so, in what circumstances, to bind a purchaser of land to pay his purchase-money without getting any evidence of title or only such a shred of evidence as may be absolutely unreliable. The concrete case is whether the present vendor is entitled to say to the purchaser, "You must be satisfied with the registration of my title subject to equities; you will get no further evidence; you are not entitled to make any inquiries about equities; such is your bargain."

If that is the law, it leaves the gate wide open to many frauds in this country, because it has become a common practice to limit the investigation of title in land purchase cases in the same way as here. Any day a purchaser may find that he has paid his money for land from which he is liable to immediate eviction—a situation which will be all the more distressing if he finds that the vendor (as in the present case) has bade adieu to his native country, and has gone to America. There is no doubt that a purchaser may preclude himself by agreement from making any inquiry as to title, and specific performance may be enforced against him. There are many precedents of agreements to take only such title as the vendor has. There are many cases in which vendors with good holding titles cannot prove them by documentary evidence, and in which it is quite reasonable that they should provide that no evidence of title should be asked for. For instance, the assignee in bankruptcy of an absconding bankrupt may know nothing, and may not be able to get any information, about the bankrupt's title to business premises. He may in such case set up for sale such interest as the bankrupt had, and the purchaser may be bound not to make any inquiry. Or an heir-at-law may be anxious to sell lands into which he has entered as heir-at-law, and may know nothing of his ancestor's title. It would be quite allowable for him to provide that the purchaser should accept his title without investigation, without deeds, without evidence of tenure, &c. There is nothing unreasonable in cases like these, nor anything to suggest dishonesty, if the vendor offers to a purchaser only such title as he may have, and a contract on this basis may be enforced. But in a case like that with which I am dealing, which suggests no reason for not disclosing the vendor's title, except an effort to foist upon the purchaser a worthless title, or mere perversity on the part of the vendor, I entertain the gravest doubt that the contract would be enforceable. It seems to be against common right and common honesty that a purchaser should be obliged to pay his purchase-money without any assurance of getting value when no fair reason is alleged for not giving at least some evidence of title. This is a view which presents itself with all the more force when I am reminded of the principle that the right of a purchaser to a good title is "a right not growing out of the agreement between the parties, but which is given by law": *Ogilvie* v. *Foljambe* (1). And there is also authority for this further proposition, that a contract by a purchaser to take such title as a vendor has does not relieve the vendor from the necessity of showing a bona fide title, and producing the best title he can from the materials in his power: *Keyes* v. *Hayden* (2)—a proposition which has special application to a case in which no explanation can be offered for refusal to make title, except dishonesty or perversity.

With these general propositions in my mind, I come to the terms of the contract in the case before me. Its subject-matter is the farm described in the particulars as held in fee subject to an annuity of £18 4*s.* 8*d.*, payable to the Land Commission.

The following, among others, are the conditions of the contract:—[His Honor read conditions 4, 4*a*, 7, and 10 set out ante, pp. 139, 140.]

The only document furnished to the purchaser was the copy of the folio of the local register, which showed that the vendor's title was registered subject to the equities (if any) mentioned in the conditions.

The purchaser having been furnished with a copy of the folio, called for an abstract, which was refused. He subsequently made the following requisitions:—[His Honor read the requisitions.]

To these the following replies were given:—[His Honor read the replies.]

With all due respect to the vendor's adviser, he laid claim to an excellence in his conditions which they certainly have not. He describes them as "clear and unambiguous." Whatever merit they may have, they do not warrant this description. I would rather call them confused, contradictory, and misleading. I read condition 4, and I find from it that the vendor is to be deemed to have a good and sufficient title and power to assign the premises. What are the premises? The lands subject to the annuity. The only meaning, therefore, that I can give to this condition is that the vendor shall be deemed to have power to assign, subject to the annuity, and nothing else, which means

(1) 3 Mer. 53, 64.

(2) 1 W. R. 73, 112; 9 Hare App. lix.

free from all equities. Now read condition 7, which provides that the purchaser shall buy and be presumed to have purchased subject to such rights or equities (if any). These conditions are inconsistent.

Condition 10 provides that if the purchaser shall make any proper objection to the title, which the vendor shall be unable or unwilling to remove, the vendor shall be at liberty to rescind the contract. This is absolutely inconsistent with a contract to take only such title as the vendor has. It implies a right to make objections to the title, with a corresponding obligation on the vendor's part to give a reasonable answer to them. What objections could this condition have referred to, except objections arising out of the equities mentioned in the register? None; because the register is absolutely conclusive on all other points. How, then, am I to construe the contract as a whole, with its parts inconsistent with one another? It is a well-recognized canon of construction that if conditions are ambiguous they are to be construed in favour of the purchaser; and I cannot hold that the purchaser in the present case is clearly precluded from making any objection to the title.

There is one further observation to be made on the conditions. The object of the vendor seems to have been to preclude an inquiry into her title prior to the date of registration under the Local Registration of Title Act, which is put forward as the root of title. But when the root of title itself embodies a restriction or incumbrance—not by mere recital, but in its operative part—a requisition that the restriction or incumbrance shall be shown not to affect the lands is in itself not an inquiry into the prior title, but into the title derived from the root put forward. I have already called attention to the distinction which must be taken between cases of graft arising under the general law and those created by the Land Acts. In order to get at the equities arising in the former class, one has to go behind the legal conveyance; but the vesting order or fiat of the Land Commission is by statute subject to the equity. The tenant-purchaser, as I have already said, is in the same position as if he held under a conveyance of land expressed to be held by him upon the same trusts and for the same purposes as previously affected his former estate. When the purchaser says this is not evidence of a title which the vendor can dispose of, he is really not inquiring into the prior title, but objecting to the title as held under the instrument put forward as the root. If the vendor has to go behind that root in order to clear up the existing title, that is his own fault in commencing with a conveyance which was expressly made subject to "an equity (if any)."

I will declare that the vendor has not shown title according to the contract.

Solicitor for plaintiff: *L. C. P. Smith.*
Solicitor for defendant: *Fegan & Co.*

R. R.

Powell J.
1920.
Feb. 4, 5, 24.

Appeal.
1920.
Nov. 26, 30.
Dec. 15.

MAGUIRE *v.* BROWNE (1).

(1919. No. 716.)

Easement—Way of necessity—Land-locked tenement—Change of user.

The plaintiff was the owner of a farm of land which he had purchased under the provisions of the Irish Land Act, 1909, and which immediately adjoined an historical moat consisting of a circular close on which timber was growing, and which was completely surrounded by lands in the occupation of persons, some of whom were tenants of the Earl of Erne, and others of whom (including the plaintiff) had purchased their holdings from him. The moat, which had never within living memory been used for ordinary agricultural purposes, but had been preserved as an object of antiquarian interest, was approached by a path leading to it from the county road over the lands purchased by the plaintiff. In the year 1919 the defendant purchased the fee simple of the moat from the Earl of Erne, and subsequently proceeded to cut down the timber growing on the moat, and to remove it by the pass leading to the county road, claiming that he had a right so to use the pass as a way of necessity. In an action for an injunction brought by the plaintiff against the defendant:

Held, by the Court of Appeal (reversing the decision of Powell J.), that the defendant's right to use the pass as a way of necessity was limited to such a use as was suitable or necessary for the enjoyment of the moat in the condition in which it was at the date of the original severance of the lands; and that the defendant was accordingly not entitled to use the pass for the purposes of carting felled timber with horses and carts.

Action claiming an injunction to restrain the defendant, his servants, and agents from entering or trespassing on a road forming part of the plaintiff's lands at Cornashee, in the County of Fermanagh, or from depositing, hauling, or carting timber on or over the said lands.

The defendant was the owner of lands known as the moat ring, which he held in fee under a conveyance dated 11th February, 1919, from the Earl of Erne to him. At the date of the conveyance the lands were covered with trees. The moat ring was entirely surrounded by lands which had been owned by the Earl of Erne, and occupied by his tenants, one of whom was the plaintiff. By agreement, dated 1st May, 1917, the plaintiff agreed to purchase his holding under the Irish Land Purchase Acts; on the 27th March, 1919, the lands were vested in him pursuant to the said Acts; on 5th December, 1919, he was registered as owner of the said lands under the Local Registration of Title (Ireland) Act, 1891. The plaintiff's lands lay between the moat ring and the county road; a path ran from the moat ring to the county road, over which path it was admitted that the defendant had a right of way of necessity on foot. The moat ring had never been used for agricultural or pastoral purposes, but was preserved as an object of antiquarian interest. In 1919 the defendant proceeded to cut down the trees, and cart them over the said path to the county road.

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(1) In the Court of Appeal, before Sir James Campbell C., and Ronan and O'Connor L.JJ.

The defendant pleaded, inter alia, that at the time of the demise of the plaintiff's lands to him or his predecessor in title the landlord of the plaintiff's lands was also owner-in-fee of the defendant's close, and had not any way to or from the close otherwise than by the way in question; and that by reason thereof the landlord and the defendant, by virtue of the said conveyance, had and has of necessity a right of way for all purposes, reasonably necessary for the use of the close at all times, and that the roadway was and is the nearest and most convenient over the lands of the plaintiff to the defendant's close.

In the course of the plaintiff's evidence, the plaintiff produced a map (marked "B") which contained at foot the following:—"I certify that this is a true copy of the map of the lands comprised in the above agreement for purchase, showing the boundaries edged red as defined on estate map lodged for registration." Stephen Huggard, an estate surveyor on the Erne estate, examined for the plaintiff, stated that when the Erne estate was being sold he mapped it and made a map of the holding of the plaintiff, of which the map marked "B" was a certified copy. He said that the pass was mapped into the plaintiff's holding, and that the certified copy map marked "B" was a copy of the map which he made. In cross-examination, counsel for the defendant handed to witness a map which counsel stated was an Estate Office map. Counsel for the plaintiff objected on the ground that there was then no evidence as to who used this map, or in whose custody it had been. In reference to this map, the witness said that he had only seen it within the last few months. According to the map, alleged to be an estate map, the lane in question was not on the plaintiff's holding.

George M'Enea, examined on behalf of the defendant, said he was an assistant in the Estate Office. He produced a bound volume containing several maps, one of which, dated in 1862, included the plaintiff's holding. Counsel for the plaintiff objected to this map being given in evidence. His Lordship refused to admit the map in the absence of evidence that the lands were in the tenancy of the plaintiff, and the moat ring in the possession of the landlord. Part of an Ordnance sheet was put in evidence by the defendant, and it is stated to be a copy of a map prepared by the Sub-Commission at the time of the fixing of the second statutory term rent. The plaintiff gave evidence of acts of ownership by him over the laneway. There was no evidence of acts of ownership by the landlord. His Lordship held that the path was part of the plaintiff's holding.

H. Wilson K.C., *T. W. Brown K.C.*, and *Finlay*, for the plaintiff.

S. Brown K.C., *Babington K.C.*, and *Maguire*, for the defendant.

The arguments were similar to those in the Court of Appeal.

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Feb. 24.

POWELL J. [His Lordship, having reviewed the evidence, proceeded:—]

Counsel for the defendant relied on Mr. Serjeant Williams' note to *Pomfret* v. *Ricroft* (1): "So where a man having a close surrounded with his own land grants a close to another in fee for life, or years, the grantee shall have a way to the close over the grantor's land as incident to the grant, for without it he cannot derive any benefit from the grant. So it is where he grants the land and reserves the close to himself. This principle seems to be the foundation of that species of way called a way of necessity. It is so in a partial sense, because the way is a necessary incident to the grant." At page 571 it is stated that "there are three sorts of private ways—1, by grant; 2, prescription; and 3, of necessity. There seems to be no doubt that whoever justifies under either of the two former titles must set forth the particular ground of his title, as if it be by grant he must show it. Now, a way of necessity, when the nature of it is considered, will be found to be nothing but a way by grant. It derives its origin from grant. For there seems to be no difference where a thing is granted by express words, and where by operation of law it pass as incident to the grant." Therefore, in both cases the grant is the foundation of title.

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(1) 1 Williams Saunders, 557.

If the origin of a way of necessity cannot any longer be traced, but the way has been used without interruption, it must then be claimed as a way either by grant or prescription, according to the circumstances of the case. Where the fact is that there existed at one period a unity of possession, it must then be claimed as a way by grant, and the uninterrupted use of it for a long time is evidence from which a Judge may presume a grant. In *Allan* v. *Gomme* (1), the question was upon the legal effect of the reservation; and Lord Denman points out the difference between such a case and a case where the right depends upon user, and he refers to cases in which it was a question for the jury to consider upon the evidence whether, for example, a carriage way proved a right of way for cattle, and a case in which, where it was admitted that there was a right of way for farming purposes, the defendant wished to establish a right to cart coal, and that the judgment of the Court seemed to be that if a party had time out of mind used a way for all purposes he wanted, it seemed to give him a general right.

He says (at page 770) there is no direct authority to show whether if the use of a place to and from which a way is by express words reserved or granted be completely changed the way can still be continued to be used. He pointed out that the case in which he was giving judgment did not depend upon the mode of using the way, but upon the legal effect of the reservation;

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(1) 11 A. & E. 759.

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that the Court thought that the way could only be used for purposes which were compatible with the ground being open, and that, if any buildings were erected upon it, it was no longer to be considered as open for the purposes of the deed. He referred to *Luttrell's Case* (1), and said that the Court there appeared to put the case on whether the alteration of the thing in respect of which the right was claimed was of the substance and not merely of the quality of the thing; and he says that the alteration of a piece of vacant ground into a cottage is certainly an alteration of the substance, and not merely of the quality.

In *Henning* v. *Burnet* (2), Baron Parke comments upon the decision in *Allan* v. *Gomme* (3), and says that he does not agree to the full extent with the doctrine there laid down, although that decision may be supported by the context, because it was a reservation of a right of way to that space only which was then used as a wood-house, and was not like the case of a general grant of a way to Greenacre, which would mean for whatever purpose the field was used, unless limited by the context. He points out that the way used in the case before the Court was to pass the defendant's land at the end, and go from thence into a field, and that that did not authorize the defendant to go any way except through the old gateway. In that case the plaintiff conveyed to the defendant a dwelling-house with a coach-house and stable at the back, and a field, together with all ways, easements, etc., to the dwelling-house and field belonging or usually held therewith, with free liberty of ingress, egress, and regress for the defendant with cattle and carriages over the carriage road and foot-path leading to the dwelling-house, coach-house, and stables. Previous to the time of the conveyance a private road was used for carriages and cattle from the turnpike road to the defendant's coach-house, stable, and field, from which road there was a gate into the field. The defendant afterwards pulled down his coach-house and stable, and built a wall across the private road enclosing a portion of the right which had been conveyed to him in fee, and he also opened a gate at the further corner of his field into the private carriage road which he used instead of the former gate,

(1) 4 Rep. 86. (2) 8 Ex. 187. (3) 11 A. & E. 59.

and drove cattle and carriages along the road, into the field, and back again. It was held that he was liable in trespass, inasmuch as the grant of all ways to the field belonging or usually enjoyed therewith extended only to the user of the way as it existed at the time of the grant through the then existing gate, and the express grant was of a right of way to the dwelling-house, coach-house, and stables only.

In *Morris* v. *Edgington* (1) a lease demised a messuage consisting of two parts, separated by an intervening reserved gateway, and to be subject only to a specific right of way to the lessee to a third building for a specific purpose only. The reservation strictly interpreted would have precluded the lessee from all access to one part, which was accessible only by crossing a yard in one of two directions—the one by entering it from the back part of the residue of the demised premises, and the other and more convenient way by entering from the public street through the reserved gateway. It was held that the lessee was entitled to the latter way through the gateway and across the yard. Mansfield C.J. there said that it would not be a great stretch to call that a reasonable way without which the most convenient and reasonable mode of enjoying the premises could not be had.

In Sheppard's Touchstone, p. 89, it is stated that when anything is granted, all the means to effect it are granted also, and shall pass inclusive together with the thing by the grant of the thing itself, without the words cum pertinentibus or any such like words. Cuicunque aliquid conceditur, conceditur etiam et id sine quo res ipsa non esse potuit.

So far as the defendant's right of way for carts depends upon a grant implied from the surrounding circumstances (or, as put by Chief Justice Earle in *Pearson* v. *Spencer* (2), that class of implied grant, where there is no necessity for the right claimed, but where the tenement is so constructed that parts of it have, in order to its enjoyment, a necessary dependence upon the adjoining tenement), in my opinion the defence would fail; because in such a case the user of the right is the only satisfactory guide as to its extent: see judgments of Bovill C.J.

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(1) 3 Taunton, 24.

(2) 3 B. & S., at p. 767.

and Willis J. in *Williams* v. *James* (1). In *Mayor of New Windsor* v. *Stovell* (2) Mr. Justice North states the rule thus: "In the case of an easement by usage, where you have to measure the extent of the easement, not by the terms of any deed, as the deed is ex hypothesi lost, but simply from what has been done, there is no way of ascertaining the extent of the easement except from what has been done." In this case there is no satisfactory evidence that this way was used by the owner of the moat ring with carts. Counsel for the defendant at the end of the case relied upon two matters only. The first was that the way formed no part of the plaintiff's land. As I have said, on the evidence I must hold that it is part of the plaintiff's land. The second contention was that there is a way of necessity from the moat ring to the public road, the moat ring being land-locked. I think there can be no doubt that there is a way of necessity from the moat ring to the public road. It is contended that the way of necessity is over the way in dispute. Having regard to the fact that it is admitted that there is a right of way on foot over this laneway from the moat ring, I think there can be no doubt that the laneway in dispute must be taken to be the way of necessity. Counsel contended that the extent of that way of necessity depends on the question as to what kind of right of way would enable the owner to enjoy the way so reserved, having regard to the reasonable use of the land in respect of which it must be deemed to have been reserved.

There does not seem to be any doubt that the right to a way of necessity to and from a land-locked close over the surrounding land is not a general right of way for all purposes, but is limited to such a right of way as was suitable or necessary for the enjoyment of the close in the condition in which it happened to be at the time that the right first arose. Although there are very many authorities on this question of rights of way of necessity, the principle as to the extent of the right does not seem to have been settled until the year 1880 in the case of the *Corporation of London* v. *Riggs* (3), which was a demurrer. In that case Sir Horace Davey, who was contending that a way of necessity included a

(1) L. R. 2 C. P., at p. 581.

(2) 27 Ch. D. 665.

(3) 13 Ch. D. 798.

general right of way for all purposes, said that the question whether a right of way of necessity to and from a land-locked close over the surrounding land was a general right of way for all purposes, or whether it was limited to such right of way as was suitable or necessary for the enjoyment of the close in the condition in which it happened to be at the time the right first arose, was one upon which there seemed to have been up to that time no express decision. In that case it was held that where the owner of a close surrounded by his own land grants the land and reserves the close, the implied right of way of necessity to and from the close over the land operates by way of re-grant from the grantee of the land, and is limited by the necessity which created it. This re-grant, however, does not create a right of way of necessity for all purposes for which the close may at any time be used, but such right of way as will enable the owner of the close to enjoy it as in the condition in which it happened to be at the time of the re-grant. For instance, if at the time of the re-grant the close was agricultural land, the owner of the close can only claim such a right of way as is suitable for the enjoyment of land in that condition; he cannot claim a right of way suitable to the user of the close as building land. The same rule applies if the grant is of the land-locked close, with an implied grant of a way of necessity over the surrounding land. The facts in that case are not in the least similar to the facts in the present case; but the judgment of Jessel M.R. appears to me to cover all the ground, and I am not aware that the principles which he has laid down in his judgment have been departed from in any subsequent case. Sir George Jessel said: "Well now, if we try the case on principle, treating this right of way as an exception to the rule, ought it to be treated as a larger exception than the necessity of the case warrants? That, of course, brings us back to the question, what does the necessity of the case require? The object of implying the re-grant, as stated by the older Judges, was that if you did not give the owner of the reserved close some right of way or other, he could neither use or occupy the reserved close nor derive any benefit from it. But what is the extent of the benefit he is to have? Is he entitled to say, I have reserved to myself more than that which enables me to enjoy it as it is at the time of the grant? And if that is the true rule, that he is not to have more than necessity requires, as distinguished from what convenience may require, it appears to me that the right of way must be limited to that which is necessary at the time of the grant—that is, he is supposed to take a re-grant to himself of such right of way as will enable him to enjoy the reserved thing as it is. That appears to me to be the meaning of a right of way of necessity. If you imply more you reserve to him not only that which enables him to enjoy the thing reserved as it is, but that which enables him to enjoy it in the same way and to the same extent as if he reserved a general right of way for all purposes, that is—as in the case I have before me—a man who reserves two acres of arable land in the middle of a large piece of land is to be entitled to cover the reserved land with houses and call on his grantee to allow him to make a wide metalled road up to it. I do not think that is a fair meaning of a way of necessity. I think it must be limited by the necessity at the time of the grant, and that the man who does not take the pains to secure an actual grant of a right of way for all purposes is not entitled to be put in a better position than to be able to enjoy that which he had at the time the grant was made. I am not aware of any other principle on which this case can be decided."

The dominant tenement in that case had been exclusively used for agricultural purposes, and the tenants had conveyed their crops and other things necessary for its cultivation; and the defendant had made preparations for the erection of a house and buildings for the sale of refreshment to the public, and had drawn timber and other materials for the erection of the workshop and other buildings across the lands; and Sir Geo. Jessel, applying the principle which he had laid down, decided that the implied right to the way of necessity there was limited by the necessity which created it, and that the defendant was only entitled to such right of way as would enable him to enjoy it as in the condition in which it happened to be at the time of the re-grant; and that he could only claim such a right of way as was suitable to the enjoyment of the land in that condition, and could not claim a right of way suitable to the user of the close as building land.

That seems to me to have been a comparatively simple matter to decide once the principle was determined; but I am dealing here with a wholly different class of property, in respect of which a right of way with carts is claimed—a certain quantity of land, with ancient trees growing upon it, surrounded by a formidable fence, and presenting all the features of great antiquity.

Spenser informs us that it was a great use among the Irish to make assemblies upon a rath or hill, there to parley about matters and wrongs between township and township. From the circumstance of its being of judicature as well as the residence of the chieftain, it obtained another name, that of "lis" or "court." These raths or hills were, according to the dialect of the foreign tribe that possessed them, called "moats." I have in the present case some evidence that assemblies took place upon the ring moat, but whether the parley was confined to matters and wrongs between township and township I am left in considerable doubt.

In Wilkinson's Geology and Architecture of Ireland it is said that raths were generally admitted to have been used for the enclosure and protection of cattle. Forts of a class larger than raths, and placed generally in an elevated and commanding position, have been erected with a particular regard to defence, having a large mound and deep fosse. These forts are also frequently protected at the base of the mound by an inclined wall, built well of dry stones, having the entrance protected with stone work, carried to a great height; and these the author treats as having been constructed from a period ranging from a very early period to the general construction of castellated edifices in the twelfth and thirteenth centuries.

When a close, the origin of which is wrapped in such obscurity, becomes a dominant tenement in a right of way case, I suppose that one ought not to complain that it is not easy to find an authority that exactly fits the case. But I think I must hold that the ring moat had lost its earlier characteristics long before the date at which the right of way came into question, namely, at the date upon which the surrounding lands were let or leased; and, assuming this to be so, I have asked myself what was the business suitable to be carried on there—what were the uses to which it might reasonably be put when the surrounding lands were let or leased to other people? This seems to me to be the question which I have to decide. Non-user does not seem to affect the question.

I have to ask myself, therefore, in this case what is the extent of the benefit the defendant is to have from this point of view. He is not entitled to say there has been reserved more than that which enables him to enjoy the close as it was at the time of the grant; it must be limited to that which was necessary at the time of the grant. He would not, for example, be entitled to cover the ring moat with houses, and call on the plaintiff to allow him to make a wide metalled road up to it. He cannot be put in a better position than such as would enable him to make such reasonable use of the close as his predecessors in title could have done at the time of the grant; and really I think it comes to this in the present case, would the owners of the Erne estate have been entitled as from the date of the re-grant to cart timber from the moat ring along the way in dispute? Is it reasonable to suppose that the re-grant only gave them the right to and from the ring moat on foot? It appears to me that so to decide would necessitate my holding that they could not cut the timber at all, because they certainly could not have it removed when cut in any other reasonable way than by carts. Again, suppose that one of these trees fell, would the owner of the moat ring be obliged either to leave it where it fell, or else to cut it up into such small pieces that a man could carry it on foot over the way in dispute?

Is it reasonable to suppose that the right of way could only be used in such manner as would result in preventing the owner from cutting and removing the trees in the ordinary way?

The moat ring, whatever its origin may have been, was, after all, at the time of the re-grant, 3 acres and 20 perches of agricultural land, with trees on it. Suppose the owner of the land wanted to graze cattle of his own upon it, as George Kelly, the caretaker, did, he could not, as far as I can see, have driven them through Kelly's land, and through the gap that Kelly made for the purposes of his own cattle, because that would not be the particular way of necessity, which I hold to be the way

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over the plaintiff's land; but, as far as I can see, according to the plaintiff's case, he could have prevented the owner of the moat ring from driving cattle to the moat ring over the way in dispute, because he only admits a right of way on foot, and claims to lock the gate at the entrance, and has provided a stile to accommodate foot passengers here; I do not think it possible for the plaintiff to maintain that position. I think it cannot be supposed that the right to the use of the way of necessity implied by the re-grant can be confined to a right of way on foot.

I think from the very inception of the right, limiting it to that which was reasonably necessary at the time of the re-grant, the owner of the moat ring might, if he thought fit to cut the timber, have used the way in dispute for the purpose of removing it by the ordinary and well-known methods of removing timber, and that the reservation of a right of way on foot only would not permit of adequate or reasonable enjoyment of the way reserved by the re-grant; and I think that, applying the principle laid down by Lord Chancellor Cairns in *Gayford* v. *Moffat* (1), it is such a way as the law would hold necessarily to appertain to premises such as these—a way suitable to the business which might require to be carried on upon the premises.

I think that the way suitable to the owner of the moat ring is and always has been a way that would enable him, if he thought fit, to cut the timber and cart it away.

In these circumstances I am obliged to dismiss the plaintiff's action.

M. G. E.

Nov. 26.

The plaintiff appealed to the Court of Appeal.

H. Wilson K.C. and *E. S. Murphy K.C.* (*Finlay* with them), for the appellant:—

We admit that the respondent is entitled to a way on foot over the pass in question, but not to a right of carting timber over it. In *Wheeldon* v. *Burrows* (2) Thesiger L.J. lays down, as the second general rule governing cases of this kind, the following proposition:—"If the grantor intends to reserve any right

(1) L. R. 4 Ch. 133.

(2) 12 C. D. 31, at p. 49.

over the tenement granted, it is his duty to reserve it expressly in the grant. . . ." The second of these rules is subject to certain exceptions. One of these exceptions is the well-known exception which attaches to cases of what are called ways of "necessity"; and (at p. 58) he says that the foundation of the judgments in *Pinnington* v. *Galland* (1) and in *Davies* v. *Sear* (2)—cases where parties were held to be entitled to derogate from their own grants—was that the ways claimed were ways of necessity. It is, however, well settled that a right of way of necessity "must be limited to that which is necessary at the time of the grant": per Jessel M.R. in *Corporation of London* v. *Riggs* (3); Gale on Easements, 8th ed., 172. "An easement of necessity . . . means an easement without which the property retained cannot be used at all, and not one merely necessary to the reasonable enjoyment of that property": per Stirling L.J. in *Union Lighterage Company* v. *London Graving Dock Company* (4). Here, from time immemorial, the moat has been regarded as an object of antiquarian interest; it has been preserved as such, and there has been no agricultural user of it. Consequently the appellant's lands cannot be burdened with any further easement than the right of way on foot which existed at the date of the severance of the lands.

There is no evidence that the conveyance to the plaintiff was the last of the series of conveyances or lettings of the lands surrounding the moat—a fact which must be proved by the respondent in order to establish his claim to a way of necessity.

The estate map was rightly rejected in evidence by Powell J.: *Pollard* v. *Scott* (5); Lord Halsbury's Laws of England, vol. iii, p. 147; vol. xiii, p. 567.

[They also cited *Pearson* v. *Spencer* (6); *Donnelly* v. *Adams* (7); and *Cowling* v. *Higginson* (8).]

S. L. Brown K.C. and *A. B. Babington K.C.* (*Martin Maguire* with them), for the respondent:—

We admit that on the existing authorities the right of way to which the respondent is entitled must be limited to such a way as was necessary at the date of the severance, but that does not conclude the case in favour of the appellant. This was an ordinary close, with trees upon it. No doubt it had an antiquarian interest; but that is immaterial. Lord Erne had the right to use it for all ordinary agricultural purposes, in the same way as any other land. He could cut down the trees and cart them away; and the way of necessity which must be implied at the time of the severance is one enabling this right to be exercised. The respondent is now owner in fee, and he only claims the right to do what Lord Erne formerly might have done.

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(1) 9 Ex. 1, 12.

(2) L. R. 7 Eq. 427, 431.

(3) 13 C. D. 798, at p. 807.

(4) [1902] 2 Ch. 557, at p. 573.

(5) 1st Peake, N. P. 26.

(6) 1 B. & S. 583.

(7) [1905] 1 I. R. 154.

(8) 4 M. & W. 245.

We submit that the estate map was evidence in the case: *Bridgman* v. *Jennings* (1); Buller's Nisi Prius, 283 a.

Cur. adv. vult.

Sir James Campbell C.:— Dec. 15.

I need not delay by any explanation of the locus in quo, or of the facts of this case, as the former is simply but clearly delineated upon the maps that were put in evidence; while, as to the facts, I could not add anything to the careful summary to be found in the judgment of Powell J. The question involved is as to the nature and extent of the right of way to which, as is admitted, the defendant is entitled, upon and along the road or laneway which runs from the county road in a straight line up to a postern gate giving access to a circular close of about three acres in extent, upon which, shortly before the occasion of the dispute between the parties, there were growing a number of valuable timber trees. These trees had been growing upon this ground so far back as any living witness could remember, and were apparently originally planted as an ornament or protection for a rath of a kind to be found in other parts of Ireland. These raths, whose origin and purpose are buried in antiquity, and can at least be only a matter of speculation, are undoubtedly regarded with feelings of reverence, while in many instances they have carefully been preserved in character by the proprietors on account of their sentimental and antiquarian interest. In the present instance the trees were planted in a sort of belt or ring, encompassing the rath, while in the centre of the close

(1) 1 Ld. Raymond, 734.

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and upon the higher ground there is a moat or mound, which is often found to exist as an adjunct or completion of the rath. The laneway in dispute, after reaching the gate giving access to the rath, turns sharply to the right until it reaches the house and out-offices on the lands of the plaintiff, and then it ends. Upon the 11th February, 1919, the defendant purchased this close of three acres from the trustees of Lord Erne, and at once proceeded to cut down the trees, intending to sell them as timber. In order to convey the fallen trees to the county road, he demolished the postern gate, and opened a space in the wall, on either side of the gate, wide enough for the passage in and out of the horses and carts engaged for the work of removing the timber as it was cut down. The plaintiff, however, immediately intervened and refused to permit the road or laneway to be used for horses and carts, asserting that it formed the avenue from the county road to his own premises, and was subject only to a right of way for passengers on foot entering or leaving the rath by the postern gate. The nature and existence of this gate, coupled with the evidence as to the actual user of this roadway, have satisfied me that, prior to its use by the defendant for the removal of the timber with horses and carts, the right of way in dispute had been from time immemorial limited to passengers on foot entering or leaving the rath, and I attach no importance in this respect to one or two casual occasions upon which it was suggested that a fallen tree from the rath was carted away by this road, nor to the act of the caretaker of the rath occasionally grazing his cow on the grass beneath and between the trees. I also agree with Powell J. in finding as a fact, upon the evidence of the Land Commission maps and the witness Huggard, that this road was included in the holding of the plaintiff during the period of his judicial tenancy, and subsequently became vested in him as owner in fee when he purchased this holding through the Land Commission. I am also of opinion that the estate map of 1862 was not admissible in evidence for the defendant. At that date the plaintiff's lands were in the occupation of another tenant, his predecessor in title, from whom he subsequently purchased them; and no evidence was given bringing home notice or knowledge to this tenant of the existence or contents of this map. It would be a dangerous doctrine if we were to allow a disputed question as to the boundaries of the tenant's holding to be influenced or determined by a map made by his landlord behind the back of his tenant, and without reference to or connexion with any dispute on the subject between them. I am, therefore, in full agreement with Powell J. in all his essential findings of fact, and I pass to a consideration of the law that should apply to them.

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Again, I agree with him in holding that when the owner of this rath close demised the adjoining lands to plaintiff's predecessor in title, a re-grant of this road or laneway to the owner should be implied as a way of necessity to his land-locked close, and that the defendant is now entitled to it by virtue of his conveyance of 11th February, 1919; but the doubtful and difficult question remains as to the nature and extent of this way of necessity. As to this, I think, the law has been correctly stated by Powell J., when he says, upon the authority of the well-known case of the *Corporation of London* v. *Riggs* (1), that the right is limited to such a way as was suitable or necessary for the enjoyment of the close in the condition in which it happened to be at the date of the original severance. This principle seems to me to be inherent in every such right, and was admitted by counsel for the defendant without prejudice to their right to challenge the decision I have just cited, in the event, which we were told was a certainty, of this case being taken to the House of Lords. Assuming this principle to apply, the real issue between the parties in this appeal is as to its application to the facts; counsel for the defendant contending that this rath close was at the date of the original severance agricultural land, and that the way of necessity must be held to exist for all purposes reasonably consistent with its user as such, including the cutting and removal of timber for sale by horses and carts; while for the plaintiff it was argued that the purposes for which such a way of necessity can be used must be limited to and measured by the necessity existing at the time as proved by its previous and continuous user. Powell J. adopted this contention by the defendant; but I have come to the conclusion that the plaintiff's

(1) 13 Ch. D. 798.

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view is correct, and more in harmony with the decisions which have been quoted, and which have been fully discussed by the learned Judge in his careful summary. I am forced to the conclusion, from a review of the evidence as a whole, that from time immemorial and down to February, 1919, this rath close was strictly preserved in its character as such, probably in deference to its antiquity and antiquarian interest, and that never at any time in its recorded history was it used for agricultural purposes in the ordinary sense. I cannot construe in any other sense the constant employment of a caretaker to exclude trespass, and the constant maintenance of the postern gate; and I am satisfied that the owner throughout this length of years would have regarded the mutilation of the plantation or its conversion into timber for sale as an act of vandalism. For this purpose, I think, the position was the same as if this belt of trees had been preserved for the protection of an ancient abbey, with the adjunct so constantly found of one of those round towers, whose origin and purpose still puzzle the historian and antiquary, and whose destruction would be regarded generally as a desecration; or as if it had been planted and maintained in connexion with the private chapel and burial-ground of the Erne family. However this may be, I am of opinion that in view of the dedication of this way throughout the entire history of its user to the single purpose of access on foot to and from this close, the defendant is not now at liberty to aggravate the burden upon the servient tenement by converting this close into a timber factory, and using the easement for haulage of timber by horses and carts.

My colleague Lord Justice Ronan has suggested to me that it may be difficult to reconcile the continuance as a way of necessity for any purpose, of the easement claimed, with the provisions of the Land Purchase Code, which confer an indefeasible title to the fee upon the tenant purchaser. This point has not been raised or argued at any stage in either Court; and had its decision been material for the purpose of my determination, I should have wished to give the parties an opportunity for its discussion. It may come up for decision hereafter in some other case, and I merely desire to make it perfectly clear that I am pronouncing no opinion upon it.

RONAN L.J.:—

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The first question in the case is: was the road in question on the plaintiff's land? It is the road from the public road to the plaintiff's house. It runs first from the road to the ring boundary, and then turns at a right angle to the plaintiff's house. It is continuous and uniform. There can be no doubt that the latter portion is on the plaintiff's land. As to the former portion, Powell J. heard and saw the witnesses and their explanation of the maps. I see no reason to justify our reversing his decision on this evidence.

The main ground of the appeal on this part of the case was his refusal to admit in evidence a certain map, produced from the Erne estate office, which, it was alleged, showed the boundaries of the holding subsequently acquired by the plaintiff. The map was in a book dated 1862. There were some entries relating to the tenancy on the opposite page. There was no attempt to prove the correctness of the map, or who made the map, or the entries, or the handwriting of the latter, or that the person who made the map, or the entries, was dead. It certainly is a startling proposition that where A has let lands to B, and there is subsequently a dispute as to the boundaries, a map made by A after the letting is evidence for him against B without any proof that the map is correct. The admissibility of the map was mainly rested on the case of *Bridgman* v. *Jennings* (1): stated also in Buller's Nisi Prius, p. 283. The report is as follows:—"It was ruled that if A be seised of the manors of B and C, and during his seisin of both he causes a survey to be taken of the manor of B, and afterwards the manor of B is conveyed to E, and after a long time there are disputes between the lords of the manors of B and C about their boundaries, this old survey may be given in evidence. And so it was done in this case. Contra if the two manors had not been in the hands of the same person at the time of the survey taken." It will be seen that the survey there was made before the conveyance to E. The "contra" clause shows that if it had been made afterwards, the map would not have been admissible. Here the map was made

(1) 1 Ld. Raymond, 734.

after the severance. The case is, therefore, a specific authority against the admission of the map. Further, it is settled law that while "private maps are evidence of reputation if proved to have been made by or under the direction, or from the information, of deceased persons of competent knowledge in proof of rights of a public or general nature, e.g., boundaries of a parish or manor," they are not evidence except against the parties who made them or their privies on questions of private rights. In *Bridgman* v. *Jennings* (1) the question was as to the boundaries of a manor. On p. 224, Mr. Phipson states the rule that "statements made by persons in possession of property qualifying or affecting their title thereto, are receivable against a party claiming through them by title subsequent to the admission"; and he adds, on the same page: "Declarations by predecessors in title are not of course evidence *for* their successors unless receivable on other grounds, e.g., as part of the res gestae, or as acts of ownership or declarations by deceased persons." *Bridgman* v. *Jennings* (1) accords with this. The survey was made before the conveyance to J. N. Here it was made after the severance. The only place where the case is referred to (apart from the copy in Buller) is, we were told, Taylor on Evidence (par. 713, 6th edition), under Admissions. Unfortunately, in stating the effect of the case, the vital fact that the survey was there made before the conveyance to the party against whom it was offered, and the equally vital "aliter" clause, are omitted. I think this error lies at the root of the appellant's argument on the question. For these reasons I am of opinion that Powell J. rightly rejected the map.

The only other defence to the action relied on is that contained in the 8th paragraph of defence. [His Lordship read the paragraph.] This is specifically traversed by paragraph 8 of the reply. The burden of proof is, of course, on the defendant. It appears from the previous matter that the defendant had access to the Erne estate documents. He claimed through Lord Erne. The plaintiff only acquired the tenancy in 1898. The case was tried on the assumption that the ring was surrounded by the Erne estate. But there was absolutely no

(1) 1 Ld. Raymond, 734.

evidence as to how much, if any, of this had been assigned or let by Lord Erne "at the time of the demise of the land to the plaintiff or his predecessors in title."

It seems to have been assumed that at the date of the trial all the land adjoining the ring was in the hands of the tenants, but there was no evidence either of the date of the creation of the plaintiff's tenancy or of any of the others, or of the state of things at that date. To sustain the vital allegation in the plea, "the landlord had not" (then) any "way to or from the close otherwise than by the said roadway, and by reason thereof . . . had, of necessity, . . . a right of way over the lands of the plaintiff," it would have been necessary, as Mr. Herbert Wilson put it, to show that the demise to the plaintiff's predecessor was the last of a series of demises of the lands adjoining the ring. I see no ground for any presumption as to the dates. The plea of way of necessity, therefore, fails absolutely on this ground alone.

The road to the tenant's house and the gate opening on it go back as far as human memory. There is no evidence of a time when they were not there. This road was obviously the most convenient way from the ring to the public road. The Lord Chancellor has stated the evidence of user, etc. If the letting to plaintiff's predecessor in title had been by deed, the rules applicable are stated in the judgment of the Court of Appeal delivered by Thesiger L.J. in *Wheeldon* v. *Burrowes* (1), that "If the grantor intends to reserve any right over the tenement granted, it is his duty to reserve it expressly in the grant. . . ." The second of these rules is subject to certain exceptions. One of these exceptions is the well-known exception which attaches to cases of what are called ways of 'necessity.'" He then examines the authorities, and the Court held the rules established.

If we assume for a moment the way of necessity to be out of the case, and assume in favour of the defendant that the road and gateway existed at the date of the demise as they did when the defendant broke down the wall, what is the inference? The passage at p. 156 of the 8th edition of Gale on Easements is

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(1) 12 Ch. D. 31.

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important as to the gateway, viz.: "Where the 'apparent sign' of user is a part, not of the tenement retained" (this case), "but of the tenement conveyed, such as a substantial and permanent doorway, . . . the doctrine of implied grant applies." Here it was part of the tenement retained. If the letting to the plaintiff's predecessor had been by deed, there would on these principles, in the absence of an express reservation, have been no right of way reserved, even on the assumption I have made.

However, here the tenancy was not, as far as appears, created by deed or writing. We know nothing of its creation beyond the fact that it was a tenancy from year to year. In such a case I think we are at liberty to apply the principles laid down by the Lord Chief Baron in his famous judgment in *Timmons* v. *Hewitt* (1), and to infer from the facts that it was a term of the tenancy that the landlord reserved a right of way through the gateway as enjoyed at the time. But I absolutely decline to assume, in the absence of all evidence, that there was then a larger entrance to the ring than the gateway, or that any more extensive right of way was reserved.

I think we are not only at liberty to draw the inference I have stated, but in my opinion it is obviously the true inference from all the facts of the case; and I find it as a fact, fully aware that I am giving the landlord the benefit of the doorway in the case, though Mr. Gale implies that he would not have been entitled to it had the grant been by deed. If I am right in this, it puts an end to the way of necessity, even if we assumed the letting to the plaintiff to have been the last of a series of lettings of the land surrounding the ring. The landlord was not deprived of access to the ring by the letting, as access was provided by the terms of the letting.

There is one other matter to which I would wish to refer. In *King-Harman's Estate* (2) Lord Justice FitzGibbon, at p. 210, and Holmes J., at p. 212, insist on the importance of giving full effect to vesting orders and fiats as between landlord and tenant. In my judgments in *Scott's Estate* (3) and in *Westropp* v. *Congested Districts Board* (4), I dealt very fully with the

(1) 22 L. R. Ir. 627.
(2) [1908] 1 I. R. 202.
(3) [1916] 1 I. R. 180.
(4) [1918] 1 I. R. 265.

subject. I only wish to say that in the middle paragraph of p. 222 my remarks in *Scott's Case* (1) were directed to a case under sect. 17 of the Act of 1903. The expression "which the tenant had not" was not intended to apply to third parties' rights. I should have said, "Everything which the vendor would have had if he had the title he pretended to have."

In the present case I must not be taken to hold that, even if a way of necessity had been acquired by Lord Erne, it would not be extinguished by the fiated agreement, which does not reserve it. I think that the provisions as to the vesting order as between vendor and purchaser are contained in sect. 31 of the Act of 1896, and that the existing rights, easements, etc., in sect. 34 are those of third parties.

This was plainly the view of the Court of Appeal in *King-Harman's Case* (2); and, although it was overruled on another ground in *Scott's Case* (1), the decision gave full effect to the view of the Court and to the vesting order in the former case (3). As between vendor and purchaser, I at present see no reason why the full statutory effect should not be given to the fiat or vesting order. The point has not been argued, and it is unnecessary in the view I have taken to express any final opinion on it.

O'Connor L.J.:—

If I were directing a jury in a case such as this, where a right of way of necessity is practically admitted, but the nature and quality of it are at issue, I should do so in the following fashion: I should tell the jury that in the absence of an express grant a right of way of necessity rests upon the supposed intention of the parties; that the law presumes that a man owning a parcel of land, and granting away all the land surrounding it, would not be so foolish as to leave himself entirely land-locked and cut off from all communication with the outer world; that, accordingly, it was to be taken that in such a case the parties understood or agreed that the owner of the otherwise land-locked land was to have a right of way; that the question in the case was, not the existence of a right of way (for that was conceded), but the extent and quality of it; that as to such extent and quality, all the facts should be taken into account in ascertaining the intention of the parties; that the jury should not approach the case with a view of determining what at the present time and in present circumstances they would themselves think a reasonable right of way, for that would be to manufacture an agreement, whereas their function was to get at the actual agreement or intention of the parties at the time the two tenements were severed; that the owner of the dominant tenement could have made an express reservation or taken an express grant of a right of way had he so chosen, and that, as he had neglected or not chosen to do so, nothing should be intended in his favour; that amongst the circumstances which would enable them to determine the extent and quality of the right were—1, the nature and quality of the servient tenement; 2, the nature and quality of the dominant tenement; 3, the actual user since the severance of the tenements; that inasmuch as the nature and quality of the tenements were, as a rule, lost in the mists of antiquity, they should infer it as best they could from the present nature and quality of the tenements and the proved history of both; that a like inference should be drawn from the proved history of the user; that of all the circumstances of the case, the user of the right was by far the most powerful piece of evidence, because it was reasonable to assume that it was the parties' own measure of the right at the time it accrued; and that, in the absence of very strong indications to the contrary, it would be unsafe to infer a right more extensive or more generous than that actually exercised.

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(1) [1916] 1 I. R. 180.

(2) [1908] 1 I. R. 202.

(3) [1916] 1 I. R. 180, per O'Brien C., at p. 195.

I suggest these observations as appropriate to enable a tribunal of fact to determine an issue of fact, namely, what did the parties intend as to the right of way when the severance was effected? Now let me apply them to the facts of the present case.

The dominant tenement here has a threefold character. It is land that may be and is used for grazing purposes, and is suitable for the growing of timber. That is one of its three characters. In another character it is a moat, a place of ancient origin, as explained by Powell J. in his interesting remarks on the subject. Such places are very common in Ireland, and are regarded by the people with some degree of superstitious reverence, many fairy stories being woven about them. These moats are often preserved by the owners, who, if they wished to make the last penny out of them, would not preserve them at all, but turn them into agricultural land. Thirdly, the moat is a knoll which from its elevation and crown of trees may reasonably be thought to prove a handsome addition to the landscape. Now, it will be observed that in the last two characters it requires no right of way save on foot, for its preservation as a moat or as a handsome knoll requires no cartway. It will further be observed that part of the agricultural user—the use of the plot for grazing—needs nothing more than a right of way on foot either, and, indeed, it can plausibly enough be argued on behalf of the plaintiff that a carway is necessary if and only if the place is to be turned into a wood or plantation to be planted and cut for profit.

It is, therefore, at least possible that the moat-owner, when he parted with the surrounding land, would have been quite content with a reservation or grant of a right of way on foot. Does this possibility tally with the user? Not only does it do so, but it is turned by the user into a probability—I would almost say a certainty.

What was the user? It was always used as a right of way on foot, and nothing more. Any evidence to the contrary was disbelieved by the learned Judge who tried the case. The wall, with its small gate, negatives completely any wider user.

I have already indicated that I think user the predominan evidence in a case of this kind. In the absence of any circumstances to explain or qualify it, I consider it, in effect, conclusive. And so holding, I am of opinion that the learned Judge was wrong in his opinion that the right of way of necessity was anything more at any time than a right of way on foot.

The defendant's counsel laid great stress on the fact that this moat was agricultural land; and that, as the growth of trees is an incident of agricultural land, a right of way of necessity must be taken to include a way which will enable the owner of it to cart dead or cut timber therefrom. This deduction as to a right of way of necessity may, perhaps, be legitimate in other cases, but in the present case it is not; for, 1, a right of way of necessity to agricultural land, depending as it does on intention or agreement, may be limited by agreement to a right of way on foot, even though the full user of the land be restricted thereby, *Appeal.* 1920. MAGUIRE *v.* BROWNE. O'Connor L.J.

as, in my opinion, it is surely here; 2, this is not merely agricultural land, but may properly be considered as a moat or ornamental grove, neither of which requires a greater way than on foot; 3, to treat it as a right of way of necessity to agricultural land and nothing else does not involve the supposition of a right of way—not merely for the purpose of carting an odd tree if and when occasion arises—but for the purpose of carting the entire of the trees so as to render profitable a speculation in timber by an auctioneer.

The case was argued before us almost entirely on the basis of a right of way of necessity. I am far from saying that Ronan L.J. may not be quite right in thinking that it is not a right of way of necessity at all.

A point was made by the defendant that the land over which the right of way exists is not the property of the plaintiff. The Judge found that it was, and there is ample evidence to support his finding in the acts of ownership deposed to. There is no real evidence the other way. A map was tendered in evidence which, for reasons stated by us during the argument, we thought was not admissible. But I should like to make a remark on a practice that has grown up of admitting evidence "subject to objection." This is, strictly, a meaningless phrase. If evidence is objected to, but admitted, of course it is received subject to objection, and there is no necessity for so stating. But what I think the expression in cases tried before a Judge without a jury means in practice is that the Judge has not quite made up his mind whether to admit it or reject it, and that he admits it with a sort of reserved power to reject it should he think, on consideration, it should not be admitted. I think this practice is wrong. A Judge should not admit or look at documentary evidence which ought to be rejected. I do not mean to say that he should not look at it for the purpose of seeing what its nature is—if its nature be in dispute—but when its nature is not in dispute, or if in dispute he has satisfied himself as to what its nature is, he should accept or reject it. He should not accept it, giving himself, by a sort of mental reservation, power to reject it later; for, after all, a Judge is human, and it is possible that his mind may be influenced by a document which he should not have seen at all.

Solicitor for the plaintiff and appellant: *M. E. Knight.*

Solicitor for the defendant and respondent: *J. Cooper.*

DUNLOP *v.* DUNLOP RUBBER CO., Limited.

Appeal.
1920.
April 29.

Injunction — Libel — Jurisdiction — Practice — Service out of jurisdiction — Rules of the Supreme Court (Ireland), 1905, *Order* 11, *r.* 1 (*g*).

The plaintiff, who claimed an injunction to restrain the defendant company from publishing or exhibiting in Ireland advertisements, placards, books, or circulars containing pictures alleged to be caricatures of the plaintiff, and to be calculated to expose him to ridicule or contempt, obtained leave, by an order made in the Chancery Division under Order 11, rule 1 (*g*), of the Rules of the Supreme Court (Ireland), 1905, to serve the writ out of the jurisdiction upon the defendant company, which had its registered office in London.

Held, by the Court of Appeal, affirming Powell J. ([1920] 1 I. R. 280), that the discretion conferred by Order 11, rule 1 (*g*), had not been exercised on any wrong principle, and that there was no ground for setting aside the order.

The defendant company appealed to the Court of Appeal (1), who affirmed the decision of Powell J. Thereupon the defendant company appealed to the House of Lords (2), who affirmed the decision of the Court of Appeal in Ireland (3).

R. ST. J. C.

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(1) In the Court of Appeal, before Sir J. Campbell C., and Ronan and O'Connor L.JJ.

(2) In the House of Lords, before Lord Birkenhead C., Lord Atkinson, Lord Moulton, and Lord Buckmaster.

(3) [1921] A. C. 367.

Land Com.
(*Ross J.*)
1921.
Feb. 25.
March 1.

LORD BELLEW'S ESTATE.

Land Purchase Acts—"Bonus"—Verbal agreements for sale completed before 24th November, 1908, *but not reduced to writing and signed till after—Agreement "entered into"—Percentage—Scale applicable—Irish Land Act*, 1903 (3 *Edw*. 7, *c*. 37), *s*. 48; *Irish Land Act*, 1909 (9 *Edw*. 7, *c*. 42), *s*. 6—*Statute of Frauds* (7 *Wm*. 3, *c*. 12 (*Ir*.)), *s*. 2.

Prior to 24th November, 1908, oral agreements were concluded between the landlord and his tenants for the sale to the latter of their holdings, but the agreements were not reduced to writing and signed until after that date:

Held, that the agreements were "entered into" before the 24th November, 1908, within the meaning of 9 Edw. 7, c. 42, s. 6, and that consequently the full percentage at the rate of twelve per cent. on the purchase-money was payable under 3 Edw. 7, c. 37, s. 48. Such agreements are not within sect. 2 of the Statute of Frauds (7 Wm. 3, c. 12 (Ir.)).

MOTION ON NOTICE.

In and prior to the year 1908 negotiations had been carried on between Lord Bellew and his tenants in the Co. Kilkenny for the sale to the latter of their holdings. These agreements were in fact concluded in October, 1908, but it was not until considerably after 24th November, 1908, that the agreements were actually reduced to writing and signed. A draft percentage certificate having been furnished by the Treasury, based on the sliding scale in the first schedule to the Act of 1909, the vendor brought the present motion objecting to the draft certificate on the ground that the agreements for sale were concluded prior to 24th November, 1908, and claiming a percentage at the rate of twelve per cent.

Garrett Walker K.C., for the vendor:—

The twelve per cent. "bonus" is payable, the agreements having been "entered into" before the crucial date: *Pollok's Estate* (1); *Fetherstonhaugh's Estate* (2); *Lord Dunalley's Estate* (3); *Blackwood's Estate* (4); *Roper Caldbeck's Estate* (5).

(1) [1909] 1 I. R. 109.
(2) [1909] 1 I. R. 232.
(3) [1909] 1 I. R. 338.
(4) [1909] 1 I. R. 382, 387.
(5) 32 I. L. T. R. 260.

J. M. FitzGerald, for the Treasury :—

The "bonus" must be on the sliding scale, and must be fixed in the case of each holding under the provisions of the Act of 1909. *Minhear's Estate* (1) deals with the title to the "bonus," and not with the "bonus" itself. Section 6 of the Act of 1909 carries on its face the answer to the vendor's objection. In *Dunalley's Estate* (2) the tenants were bound; it is clear that in that case Wylie J. assumed that something must be signed. Further, the Statute of Frauds is a difficulty in vendor's way. In *Fetherstonhaugh's Estate* (3) there was part performance, and something very like the memorandum required under the statute.

Garrett Walker K.C., in reply :—

Under the Acts of 1903 and 1909 the "bonus" was treated on a wholly different basis. The latter introduced the principles of segregation and calculation by reference to the various holdings. The Statute of Frauds has no bearing on the present question.

Cur. adv. vult.

Ross J. :—

March 1.

This is an objection to the draft percentage certificate. The question is whether the percentage is to be calculated at the rate of twelve per cent. or on the sliding scale. If the purchase agreement was, within the meaning of the Land Act of 1909, sect. 6, entered into on or before the 24th of November, 1908, the percentage is payable at the rate of twelve per cent. There are two estates, the Chatsworth and Clough estate and the Hume estate, belonging to the vendor in which the same point arises. The negotiations for the sale of the Chatsworth estate began on the 1st October, 1908, and concluded on the 7th October, 1908, when the terms submitted by the vendor were accepted by all the tenants. Instructions were thereupon given to have the agreement carried out in the usual prescribed form. The agreement arrived at was not reduced to writing, but it was never varied in any respect, and has since been carried out. The dates are slightly different in the case of

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(1) 38 I. L. T. R. 215.

(2) [1909] 1 I. R. 338.

(3) [1909] 1 I. R. 232.

Land Com. (*Ross J.*) 1921.

LORD BELLEW'S ESTATE.

the Hume estate. A final agreement was reached at an earlier date in that case, but the agreement was not reduced to writing. The difficulty in the case arose through no fault of the vendor or the tenants. Several of the tenants were ill, and unable to sign the necessary forms before 24th November, 1908; one of them was abroad; another died, and the form was signed by his representative; another sold his holding, and the form was signed by the purchaser. Nearly all the forms were signed within a month after the 24th November, the crucial date, and some of them a little later. In no case was there the slightest variation from the terms of the original agreement. The section requires the purchase agreement to be "entered into" on or before the 24th of November, 1908, in order to secure the twelve per cent. It does not state that it must be in writing, nor does it make a prescribed form of agreement obligatory. The section seems to contemplate an agreement, not for the sale of holdings, but for the sale of an estate. The use of the prescribed forms in the case of each holding is only a matter of procedure.

Is the original agreement, which has never been varied in any particular, which has never been questioned by anybody, and has since been carried out in its entirety, to be wholly disregarded? Are we only at liberty to consider the dates appearing on the prescribed forms? Is the original agreement a nullity because it does not comply with the Statute of Frauds? Clearly it is not a nullity.

The 2nd section of the Irish Statute of Frauds provides that no action shall be brought upon a contract for the sale of lands unless the agreement or some memorandum or note thereof shall be in writing and signed by the party to be charged, or as therein provided. The section does not say that the agreement is void for all purposes if not reduced to writing. It provides, in order to guard against frauds, for a definite kind of proof before the agreement can be enforced in an action against a party resisting its enforcement.

In the words of Lord Lindley in *In re Hoyle* (1): "The statute does not affect the validity of the contract, but only makes a particular kind of proof necessary to enable a party to bring an action upon it." In *Dunalley's Estate* (1), a case dealing with the percentage payable under sect. 48, sub-s. 3, of the Irish Land Act of 1903, Walker C. says: "It [meaning the agreement] has existence independently of the Statute of Frauds, which does not avoid it." It is not necessary for the party seeking to enforce such an agreement to have signed it. Moreover, according to our statutory rules, the assertion of an alleged agreement could not be questioned unless the statute is specially pleaded.

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(1) [1893] 1 Ch., at p. 97.

It follows from all this that a concluded agreement, though not in writing, cannot be ignored or treated as void. I am, therefore, of opinion that a valid agreement for the purchase of these two estates was entered into within the meaning of the section before the 24th of November, 1908, and that the vendor is accordingly entitled to a percentage calculated at the rate of twelve per cent.

Solicitors for the vendor: *Lewis J. Watters & Son.*
Solicitor for the Treasury: *Patrick Coll.*

T. C. T.

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(1) [1909] 1 I. R. 338.

Powell J.
1920.
Nov. 16.

IN RE M'SWINEY AND HARTNETT'S CONTRACT AND THE CONVEYANCING ACT, 1881.

(1919. No. 346.)

Conveyancing Act, 1881 (44 *&* 45 *Vict. c.* 41), *s.* 5—*Payment into Court in respect of incumbrances on sale—Estoppel—Payment out.*

Section 5 of the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), provides that where land subject to any incumbrance, whether immediately payable or not, is sold by the Court or out of Court, the Court may, if it thinks fit, on the application of any party to the sale, direct or allow payment into Court, in case of an annual sum charged on the land, or of a capital sum charged on a determinable interest in the land, of such amount as, when invested in Government securities, the Court considers will be sufficient . . . to meet the incumbrance and any interest thereon.

Held, that an order of the Court made pursuant to the said section is not a judgment in rem as regards matters not material to the order, and does not estop a vendor who has availed himself of its provisions from saying that, at the date of payment into Court, the incumbrance was statute-barred.

SUMMONS in the matter of a contract, dated 8th day of January, 1919, and made between the Rev. James M'Swiney and Cornelius Hartnett, for the sale of the holding of farm of land, being part of the lands of Drominagh, containing 130 acres or thereabouts, situate in the barony of Duhallow, and county of Cork, held under a statutory tenancy at the yearly judicial rent of £63 13*s*. 0d., and in the matter of the Conveyancing Acts, 1881-1911.

By order of the High Court of Justice, Chancery Division, dated 26th day of May, 1919, made in the said matter, it was ordered that the Rev. James M'Swiney should be at liberty to lodge in Court the sum of £220 to meet the incumbrance on the lands mentioned in the title, created by an indenture of mortgage, dated the 12th March, 1880, from Honora M'Swiney and Thomas M'Swiney to the Cork Investment and Land Building Society, and any interest due thereon, and also a sum of £30 for the purpose of meeting the contingency of any further costs and expenses; and by the order it was declared that on the lodgment in Court of the said sums the said lands should be freed from the said incumbrance. Pursuant to the said order, the Rev.

Powell J.
1920.

In re M'Swiney and Hartnett's Contract.

James M'Swiney lodged in Court a sum of money now represented by £265 19*s*. 9*d*. Five per Cent. War Loan and £13 6*s*. cash. The Rev. James M'Swiney was absolute owner of the said lands since the year 1900, and put up the lands for sale in 1920. The mortgage of the 12th March, 1880, was discovered in investigating the title to the lands. Since 1900 no demand for any money due or alleged to be due under the said mortgage was made, nor was any acknowledgment given of the right of any person to any interest under the mortgage. The Rev. James M'Swiney brought the present summons asking that the money lodged pursuant to said order should be paid out to him.

Costello, for the applicant.

G. W. Walker K.C., for the liquidator of the Cork Investment and Land Building Society:—

The vendor obtained the order for sale free from incumbrances, and cannot now be heard to say that the mortgage is statute-barred. He might, when paying money into Court, have reserved his right to object, but he came in under sect. 5, and thereby admitted his liability under the mortgage. The jurisdiction of the Court under sect. 5 is based on the existence of a charge. The vendor might have reserved his right to raise any question as to the existence of the incumbrances, as was done in *In re Freme's Contract* (1).

The order under sect. 5 was an order in rem, and not merely inter partes, but binding on everybody: *Duchess of Kingston's Case* (2). A person cannot, having had all the advantage and benefit of an order, both approbate and reprobate it: *Rex* v. *Taylor* (3); *Roe* v. *Mutual Loan Fund* (4). In the latter case the applicant tried to reserve his right, but Lindley L.J., at p. 351, says: "The clause in the letter to the effect that the receipt was to be without prejudice to the plaintiff's right was an ineffectual protest, indicating the intention of the plaintiff, but having no legal operation."

My client is not limited to six years' interest: *In re Lloyd, Lloyd* v. *Lloyd* (5).

(1) [1895] 2 Ch. 256.
(2) 2 Sm. L. C., 12th ed., 754.
(3) [1915] 2 K. B. 593.
(4) 19 Q. B. D. 347.
(5) [1903] 1 Ch. 385.

Costello, in reply:—

There was ample jurisdiction to make the order under sect. 5, which was intended to facilitate sales of land in cases where it was doubtful whether there was an existing incumbrance. As a matter of fact, there was an incumbrance, which turned up in the Registry of Deeds—a blot on the title. The charge was subsisting, though perhaps statute-barred. The title of the incumbrancer in the present case is absolutely extinguished.

[*G. W. Walker K.C.*:—But you are estopped from saying so.]

POWELL J.:—

The money of which payment out is now asked was lodged under sect. 5 of the Conveyancing Act, 1881. The affidavit in support of the application for liberty to lodge it left open questions which might at another time be raised—questions as to whether the incumbrance was statute-barred or had been kept alive by payments or by acknowledgment of the debt. Mr. Walker argues that the order allowing payment into Court was a judgment in rem. But the words in sect. 5 do not refer to a particular incumbrance, but refer generally to "any incumbrance." "With regard to these judgments in rem, they are conclusive as to nothing which might not have been in question or was not material": 2 Smith's Leading Cases, p. 780. The question whether this was a charge which could be enforced, or which was barred, was not material to the order allowing payment into Court. These were matters not raised and not in question when I made the order under sect. 5. Therefore I have come to the conclusion that this order was not a judgment in rem, and that, while it is true that there was a charge in existence, the vendor is at liberty now to assert that the incumbrance was at the date of his application and still is statute-barred, and is entitled to have the money in Court paid out to him.

Solicitors for the applicant: *J. J. O'Meara & Co.*

Solicitors for the Liquidator, Cork Investment and Land Building Society: *MacCarthy & Hanrahan.*

D. M. S.

POLLOCK *v.* ENNIS.

(1921. No. 246.)

Powell J.
1921.
April 11.

Will appointing no trustees—Jurisdiction of Court to appoint trustees.

A testatrix by her will gave certain pecuniary legacies and devised and bequeathed the residue of her property to A for life, with remainder to certain named persons. No trustees were appointed by the will. No debts were due by the testatrix at the date of her death. The executor, having paid all funeral and testamentary expenses, held certain shares, representing the residue of the estate. On an application by the tenant for life and the remaindermen for the appointment of trustees of the will:

Held, that the Court had jurisdiction to appoint trustees.

ORIGINATING SUMMONS.

Elizabeth Pollock, by her will dated 5th November, 1915, and two codicils thereto, bequeathed several pecuniary legacies, and devised and bequeathed the residue of her property to her sister Catherine Pollock for life, with remainder to certain named persons. By the will she appointed the defendant J. F. Ennis and Jane Frazer her executors, but she appointed no trustees. Jane Patterson renounced probate, and probate was granted to J. F. Ennis. No debts were due by the testatrix at the date of her death; all the funeral and testamentary expenses having been paid by the executor, he held certain shares and cash, representing the residue of the estate. Catherine Pollock and the remaindermen now applied that J. F. Ennis and Jane Patterson be appointed trustees of the will and codicils.

Devitt, for the plaintiffs, submitted that the Court had jurisdiction to appoint trustees. He referred to *Dodkin* v. *Brunt* (1); *Re Ponder* (2).

His Lordship made the order applied for.

Solicitor for the plaintiff: *John Hawthorne.*

M. G. K.

(1) L. R. 6 Eq. 580.

(2) [1921] W. N. 122.

Lord Chancellor (In Lunacy).
1921.
April 15.
May 10.

IN THE MATTER OF L, A PERSON OF UNSOUND MIND, DECEASED.

Deceased lunatic's insolvent estate—Payment of costs and lunacy percentage—Priority.

The Court has jurisdiction to make an order under sects. 51 and 55 of the Lunacy Regulation (Ir.) Act, 1871 (34 & 35 Vict. c. 22), directing costs properly and necessarily incurred in a lunacy matter, and arrears of percentage payable under sect. 109 out of the lunatic's estate, to be paid in full thereout in priority to all other claims.

The Lord Chancellor made an order to this effect, the estate of the deceased lunatic being insolvent.

PETITION under the 54th section of the Lunacy Regulation Act, 1871 (34 & 35 Vict. c. 22), to confirm a report under the 52nd section for the purpose of winding up the lunacy matter.

The petition prayed, among other things, for payment of the taxed costs of the committee and of the sums certified under sects. 109 and 110 of the Act, as due for lunacy percentage, in priority to all other claims. The personal estate was insufficient to pay the creditors in full.

The deceased, while sane, had mortgaged his life estate in certain lands to the North British and Mercantile Insurance Company, and at the time of his death a large sum remained due to the insurance company on foot of the mortgage after giving credit for the amount realized on a policy of insurance given as collateral security.

Longfield, for the petitioner:—

Costs properly incurred in lunacy proceedings are really on the same footing as a claim on account of necessaries: *Williams* v. *Wentworth* (1); *Re Cumming* (2). The statutory percentage is in substance part of the costs, the lunatic having in return the benefit of the protective jurisdiction of the Court. Such claims displace those of other creditors, even though they have specific liens: *In re Pink* (3); *In re Plenderleith* (4); *In re Winkle* (5).

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(1) 5 Beav. 325.

(2) 5 De G. M. & G. 30.

(3) 23 Ch. D. 537.

(4) [1893] 3 Ch. 332.

(5) [1894] 2 Ch. 519.

Wm. Jellett K.C., on behalf of the insurance company, submitted that costs and percentage should rank pari passu with the other liabilities of the deceased, and abate rateably.

Lord Chancellor (in Lunacy). 1921.

IN THE MATTER OF L.

May 10.

SIR JAMES CAMPBELL C.:—

This was a formal application to me under my jurisdiction in lunacy, on behalf of the committee of the lunatic, to dismiss the matter out of Court and terminate the proceedings in consequence of the death of the lunatic. The motion asks that the report of the Registrar on the committee's statement of facts may be confirmed, and that certain sums may be ordered to be paid out of the personal estate of the deceased lunatic in priority to all other claims and demands upon it. The sums referred to are, first, certain costs which (subject to taxation) have been necessarily and properly incurred, including the costs of the committee and receiver, and the costs of the motion itself; second, a sum of £55, being the arrears of the percentage payable out of the lunatic's estate pursuant to the Lunacy Regulation (Ireland) Act, 1871, sect. 109, and a sum of £33 17*s.*, the expenses of the deceased's funeral. The personal estate will not suffice to pay the creditors in full, the North British and Mercantile Insurance Company being the principal sufferers in respect of a substantial balance due to them in respect of principal and interest under a mortgage.

Their counsel, Mr. Jellett, in resisting the application for priority of payment in respect of the sums I have mentioned, has challenged the jurisdiction of the Court to grant the application, and contended that they stand for this purpose on the same footing as the amount due to his clients, and that all must be paid rateably in proportion to their amounts. As this contention would, if correct, be inconsistent with the continuous practice and procedure of the Court since jurisdiction was conferred upon it by the Act of 1871, I postponed my judgment on the motion, though I confess I entertained no doubt about it from the first, notwithstanding Mr. Jellett's strenuous argument. He, as I understood him, admitted in the earlier part of his argument that he could not sustain his contention, so far as the arrears of percentage or maintenance charge were concerned, if the lunatic were still living; but when I called his attention to sect. 51 of the

Lord Chancellor (in Lunacy). 1921.

IN THE MATTER OF L.

Sir James Campbell C.

Act of 1871, whereby the powers, control, and authority of the Lord Chancellor over the real and personal estate of a deceased lunatic are continued after his death until the Court shall have ordered its discharge, he receded from his admission, as he was entitled to do, and challenged the jurisdiction without qualification. No suggestion was or could have been made that any of the costs claimed in this matter were improperly or vexatiously incurred or otherwise than in the proper and usual procedure for the care and custody of the lunatic and his property; nor was it alleged that the claim for the funeral expenses was in any sense excessive, while the arrears of percentage were admittedly due.

In these circumstances the only questions arising for decision are: first, has this Court jurisdiction to make the order asked for? and, second, if the jurisdiction exists, is this a case in which it should properly be exercised? The first is, in my opinion, completely disposed of by sect. 55 of the Act of 1871, the material portions of which are as follows:—"In any order confirming a report to be made by the master pursuant to the provisions of the sixty-sixth section of this Act, the Lord Chancellor, intrusted as aforesaid, may further order, if it should seem fit and convenient to him, (2) that the claims and demands against the estate of the said lunatic in the matter of the lunacy be paid out of the stock or cash standing in the books of the Bank of Ireland to the credit of the Accountant-General of the Court of Chancery . . . or out of such moneys forming portion of the estate of the lunatic as may then be in the hands of the receiver of the estate or committee of the estate of such lunatic, and in such manner, at such time, and subject to such conditions as to the Lord Chancellor may seem fit." The report therein referred to is plainly that prescribed by the antecedent sect. 52, and the reference to sect. 66 in sect. 55 is an obvious error, as sect. 66 deals with a wholly different matter. The draftsman probably had the English Act before him, sect. 66 of which corresponds to sect. 52 of the Act. of 1871. This report is to set out inter alia the claims and demands against the estate of the lunatic in the matter of lunacy for costs, maintenance, and otherwise; and it is difficult to conceive language which could confer upon the Court a wider discretion in the determination of the priority in which those claims are to be paid

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IN THE MATTER OF L.

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than that to be found in the words which I have quoted from sect. 55. Similarly, under sect. 94 the Lord Chancellor may order the costs of any proceedings to be paid and raised out of the lunatic's estate in such manner as he may think proper. As to the percentage, it is regulated by a section of its own, 111, which makes it a charge upon the estate of the lunatic and payable thereout, though the lunatic has died before payment; while in every case the payment shall be enforced in such manner and under such conditions as the Lord Chancellor shall direct. I need not delay to discuss the second question, as these costs and funeral expenses would be paid in priority as a matter of course in administration proceedings; and the cases referred to by Mr. Longfield conclusively establish that under the corresponding legislation in England the Courts have repeatedly approved and directed the payment of these particular demands in the priority asked for in this particular case: see especially as to costs: *In re Cathcart* (1); and as to maintenance, *In re Pink* (2); *In re Plenderleith* (3); and *In re Winkle* (4).

I shall accordingly make the usual order confirming the report of the Registrar, and sanctioning the payments of these several sums in the priority asked for by the notice of motion.

Solicitor for the petitioner: *C. C. Shaw.*

Solicitors for the North British and Mercantile Insurance Company: *Wm. Roche & Sons.*

(1) [1893] 1 Ch. 466.
(2) 23 Ch. D. 537.
(3) [1893] 3 Ch. 332.
(4) [1894] 2 Ch. 519.

M. R.
1921.
April 26.

IN THE MATTER OF THE TAXATION OF A BILL OF COSTS BY WILLIAM ALEXANDER TO WILLIAM GRAHAM.

(1921. No. 273.)

Solicitor—Bill of Costs—Specific contract as to costs—Deducing title—Scale fee disallowed—Solicitors' Remuneration Act, 1881 (44 *&* 45 *Vict. c.* 44)—*General Orders,* 1884, *Schedule* 1, *Part* 1.

In a contract for the sale of real property the purchaser entered into an agreement as follows:—"Assignment to be prepared by my solicitor at my expense, together with all searches and abstracts of title or copies of documents." The vendor's solicitor in furnishing his bill of costs claimed the scale fee, relying on schedule 1 of the General Orders, 1884, under Solicitors' Remuneration Act, 1881. The Taxing Master ruled that the bill was prepared on a wrong principle, and that as the contract was specific the vendor's solicitor was not entitled to the scale fee, and directed an amended bill of costs to be furnished setting forth the charges in detail.

Held, that the Taxing Master was right.

APPEAL from the ruling of the Taxing Master.

On the 3rd March, 1920, an agreement was entered into by Dr. T. K. Greenfield for sale of certain premises in Belfast to William Graham. The contract contained the following agreement by the purchaser:—"Said assignment to be prepared by my solicitor at my expense, together with all searches and abstracts of title or copies of documents." The vendor's solicitor (William Alexander) prepared the abstract of title and copies of necessary documents. He also prepared draft requisitions for searches in the Registry of Deeds and in the Judgments Office. The purchaser's solicitors had made the search in the Registry of Deeds themselves, but they approved the draft requisitions for search in the Judgments Office which was made by the vendor's solicitor. The vendor's solicitor claimed that he was entitled to be paid the scale fee under Schedule 1, Part 1, of the General Orders of 1884. The Taxing Master ruled against this contention, and held that the contract was specific as to the costs payable by the purchaser. The present application was to review the Taxing Master's ruling and to have the bill of costs taxed in accordance with the scale contained in the General Orders.

S. L. Brown K.C. (with him *C. Murphy*), for the vendor:—

We have done substantially all the work required to entitle us to the scale fee. A solicitor's work must be paid for under the scale if he does this. Deducing title means examining title de novo, and involves reading of abstract. Preliminary reading of a lease is also part of deducing title: *In re Lacey & Son* (1). The contract here is in effect that the purchaser shall pay the vendor's costs of the sale.

H. Wilson K.C., for the purchaser:—

My client only contracted to pay for certain specified items, and did not contract to pay for furnishing searches or perusing and completing conveyance. In *In re Lacey & Son* (1) there was an express contract to pay the vendor's costs; and Fry L.J. there lays down that three things must be done to entitle the scale fee to be charged, viz., deducing the title, perusing the conveyance, and completing conveyance. I submit that the Taxing Master took a perfectly correct view, and that I have not contracted myself within the scale fee.

O'Connor M.R.:—

In this case Mr. Wm. Graham agreed to purchase from Dr. T. K. Greenfield certain leasehold premises situate in High Street, Belfast, at the price of £13,000. The contract contained a special clause, the effect of which is the only matter in dispute. It provided that the assignment should be prepared by the purchaser's solicitor at his expense, "together with all searches and abstracts of title or copies of documents." This is not very clearly expressed, but it was agreed that its meaning is that the purchaser, in addition to bearing the costs of the preparation of the conveyance, should also pay for all searches and the abstracts of title or copies of documents. The purchase was completed, and the vendor's solicitor made out a bill of costs which was furnished to the purchaser as the person liable to pay, but drawn as between the vendor and his own solicitor. The first item in the bill is £116 5*s*., being the scale fee on the purchase-money, £13,000.

(1) 25 Ch. D. 301.

On the taxation the purchaser objected to this item on the ground that he was not under the contract liable for all the vendor's costs, but only for searches and abstracts of title or copies of documents. The Taxing Master held that the purchaser's contention was right, and that he was not liable for the scale fee. He directed the vendor to lodge an amended bill of costs setting out in detail the charges for the preparation of the abstract and copies of documents and for searches. From this ruling of the Taxing Master the vendor's solicitor has appealed. In my opinion the ruling was right, having regard to the contract. It has for a long time been established that the scale applies only in cases in which substantially all the work which the percentage was intended to cover has been done. As between the vendor and his solicitor, the latter may be entitled to charge the scale fee, but I am not deciding any question as between them. I have only to decide how much of the vendor's liability the purchaser assumed by the contract. If he assumed the full liability, he would be liable to pay according to the scale. But this was not his contract; he only assumed liability for the searches, abstract of title, and copies of documents. This by no means covers all the things for which the percentage is payable under the Solicitors' Remuneration Act. It leaves out negotiation, preparation of contract, and completion of conveyance. For these reasons I am of opinion that the ruling of the Taxing Master was right.

Solicitor for the vendor: *Wm. Alexander.*
Solicitors for the purchaser: *E. & L. Kennedy.*

R. R.

PATRICK HEGAN, A Registered Owner of Land.
(Folio 2142. Co. Tyrone.)

Land Reg.
(*Ross J.*)
1921.
May 27.

Land Registry—Registered charge—Increase in interest payable—Increase of Rent and Mortgage Interest (*Restrictions*) *Act*, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-ss.* 2, 4.

The statute 10 & 11 Geo. 5, c. 17, applies only where the relation of landlord and tenant exists.

Held, therefore, a deed of covenant purporting to increase by two per cent. the amount of interest payable on foot of a charge on registered land did not contravene the provisions of the Act.

Motion on Notice.

Patrick Hegan was registered on the 9th August, 1899, as owner in fee-simple of the lands in the folio, subject to equities and to the Land Purchase annuity. The poor law valuation of the land was £4 5*s.*; of the buildings on it, 10*s.* On the 5th May, 1906, a charge was registered in favour of the Coagh Loan and Monetary Co., Ltd., to secure £25, and interest at 6 per cent. On the 9th April, 1921, a deed of covenant was executed, increasing the interest to 8 per cent. When this deed was tendered for registration, the Registrar, being in doubt as to the effect of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, referred to the Court the question whether the transaction contravened the statute.

Baxter, for the Coagh Loan Co.:—

I rely on three points: 1, the Act only applies where the relation of landlord and tenant exists; 2, even if there was such a relation, sect. 12, sub-s. 2 (iii), would exclude the operation of the Act; and, 3, even if I am wrong on my first two points, the transaction should be registered for what it is worth. As to 1—the Act only applies (sect. 12, sub-s. 4) to mortgaged property consisting of or comprising one or more dwelling-houses to which the Act applies—i.e., a house or part of a house "let as a separate dwelling." The idea of a "letting" governs the entire Act. Before the Act applies there must be a landlord and a tenant. "The whole scope and purport of the Act is to restrict the right of landlords to recover possession of premises": Avory J. in *Goodwin* v. *Rhodes* (1). The Act also restricts mortgagees' rights, but only in cases of tenancies under the Act. On my second argument, if I am wrong in my first, the Act only applies under proviso (iii) to sect. 12, sub-s. 2, where the house is the substantial part of the letting. Here the poor law valuation of the land is £4 5*s.*, of the buildings 10*s.*; so that this holding is clearly excluded from the purview of the Act. On the third point I rely on *In re Mary Geoghegan* (2).

Ross J. :—

As far as Mr. Baxter's first point is concerned, I cannot see how the Act can be applied to any case where the relationship of landlord and tenant does not exist. Sect. 12, sub-s. 2, contemplates a letting and nothing else [his Lordship read the sub-section]; and sub-s. 4 of the same section limits the mortgage provisions of the Act to cases of lettings [his Lordship read the sub-section]. I think further that Mr. Baxter's second point—the question of valuation—is conclusive as showing the Act does not apply. I am with Mr. Baxter on his first two points; I do not think it necessary to express any opinion on the third. The answer to the question in the notice of motion will accordingly be in the negative.

Solicitors for the applicant: *Venables & Byers.*

T. C. T.

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(1) [1921] 2 K. B. 182, at p. 185.

(2) [1918] 1 I. R. 188.

ARTHUR BLAKE, A Registered Owner of Land.
(Folio 7635. Co. Mayo.)

Land Reg.
(*Ross J.*)
1921.
Feb. 22.

Land Registry—Land purchased by Congested Districts Board and resold—Devolution of interest—Irish Land Act, 1903 (3 *Ed.* 7, *c.* 37), *Part II*, *ss.* 74–82—*Local Registration of Title* (*Ireland*) *Act,* 1891 (54 *&* 55 *Vict. c.* 66), *Part IV.*

Land purchased by the Congested Districts Board under the powers conferred on it by Part II of the Irish Land Act, 1903 (3 Ed. 7, c. 37), and resold by them is subject to the provisions of Part IV of the Local Registration of Title (Ireland) Act, 1891 (54 & 55 Vict. c. 66), and consequently on the death intestate of the registered owner becomes vested in his personal representative.

Motion on Notice.

In 1905 the lands comprised in folio 7635, Co. Mayo, were purchased under the provisions of the Irish Land Act, 1903, by the Congested Districts Board, who re-sold them in 1910 to Arthur Blake, who was duly registered under the Local Registration of Title Act, 1891, as owner in fee simple. On 17th February, 1916, Arthur Blake died a bachelor and intestate, and on 16th May, 1917, administration of his personal estate was granted to his nephew, Austin Crean, who, by deed of transfer dated 30th June, 1917, purported to transfer the land to Lawrence Ward in fee simple. The heir-at-law of Arthur Blake was Joseph Thomas Blake, a minor, whose guardian was Miss Elizabeth Hopkins, his aunt. The question referred to the Court by the Registrar for decision under sect. 14, sub-s. 2, of the Local Registration of Title (Ireland) Act, 1891, was as follows:—"Is land purchased by the Congested Districts Board under their powers conferred by Part II of the said Irish Land Act, 1903 (sects. 72–84 inclusive), and re-sold by them subject to the provisions of the Local Registration of Title (Ireland) Act, 1891, Part IV, dealing with the devolution of interest in freehold registered land sold under the Purchase of Land (Ireland) Acts, and in consequence held by the personal representatives of a deceased registered owner as trustees for the persons by law beneficially entitled thereto; or is the devolution governed by the law dealing with real property without reference to the Local Registration of Title (Ireland) Act, 1891?"

Maguire, for the purchaser (the applicant).
Marnan, for the vendor.

The heir-at-law, though served, did not appear.

The general solicitor for minors before the order was drawn up intimated that he did not propose to argue the question.

HIS LORDSHIP held that the land in question was subject to the provisions of Part IV of the Local Registration of Title (Ireland) Act, 1891, and consequently became vested in Austin Crean as personal representative of Arthur Blake.

Solicitors for the purchaser: *Cussen & Kieran.*
Solicitor for the vendor: *M. C. O'Meara.*
General solicitor for minors: *Frank V. Gordon.*

T. C. T.

CAREY KNOX'S ESTATE.

(Rec. No. E.C. 6434.)

Land Com.
Ross J.
1921.
April 26, 27.
May 3.

Tithe rentcharge, Liability for—Sub-lessee of bishop's land—Toties quoties covenant for renewal—Estate equivalent to perpetual estate—Deed containing any provision, contract, or covenant for perpetual renewal—Perpetuity grant to immediate tenant—Tithe Rentcharge (Ireland) Act, 1838 (1 *&* 2 *Vict. c.* 109), *sects.* 7, 8—*Church Temporalities Act,* 1833 (3 *&* 4 *Wm.* 4, *c.* 37), *sects.* 128, 149, 152, 154.

The immediate tenant of bishop's lands obtained in 1836 a perpetuity grant under the Church Temporalities Act, 1833 (3 & 4 Wm. 4, c. 37). His sub-tenants then, and at the passing of the Tithe Rentcharge (Ireland) Act, 1838 (1 & 2 Vict. c. 109), held from him under leases containing toties quoties covenants for renewal.

Held, that the sub-tenants had, in 1838, estates or interests held under deeds containing covenants for the perpetual renewal thereof within section 8 of the latter Act, and had accordingly equivalent estates or interests within section 7, and were liable for tithe rentcharge.

On the ruling of the final schedule a sum of £300 was retained at item 2 to meet the claim (if any) of the Land Commission in respect of certain tithe rentcharges appearing on the Land Commission certificate. The case was now listed to have the question decided whether the tithe rentcharges were payable by the vendor, and consequently redeemable out of the purchase-money, or by the purchasing tenants; but the latter had no notice other than the usual notice of the final schedule, served on them on November 6th, 1920, which, however, contained a special clause calling attention to the fact that the vendor disclaimed liability.

Prior to 1836 the vendor's predecessors in title held the lands sold in this matter under leases for twenty-one years from the Bishop of Derry, which leases appear to have been renewable by custom, the last renewal being dated 23rd June, 1835. In the year 1836 the then immediate lessee from the Bishop, one Theophilus Jones, in consideration of the sum of £3,168 14*s.* 7*d.*, acquired the fee-simple subject to the payment of a perpetuity rent of £337 2*s.* 10*d.* (subject to variation) under the provisions of sect. 128 of the Church Temporalities Act of 1833 (3 & 4 Wm. 4, c. 37). The predecessors in title of the purchasing tenants held under various leases, dating from 1740 to 1826, from the bishop's immediate lessee for twenty-one years, containing toties quoties covenants for renewal. In one case the bishop's lessee covenanted to renew "in the toties quoties way as often as he should renew with the bishop or his successors." In another he covenanted "that he would renew the said lease as often as he would renew the grand lease with the See of Derry." There was no information as to the form of the covenant in any other of the leases. In one case the renewal fine was £1 15*s.* 10½*d.*, as compared with a rent of £11 12*s.* 7½*d.*; in another £5 11*s.* 7½*d.*, as compared with a rent of £3 7*s.* 10*d.* Subsequent to the passing of the Tithe Rentcharge Act of 1838 (1 & 2 Vict. c. 109), viz., in or about the years 1839 and 1840, the sub-lessees took out sub-perpetuity grants under the Church Temporalities Act of 1836 (6 & 7 Wm. 4, c. 99), the consideration in one case being £34 19*s.* 7*d.* Prior to 1838 the compositions in lieu of tithes were paid by the sub-lessees as occupiers of the lands, pursuant to the provisions of Goulburn's Act (4 Geo. 4, c. 99). After the obtaining of the sub-perpetuity grants (as far as the Land Commission had any information on the point) the tithe rentcharges seem to have been paid by the sub-grantees direct to the persons entitled; but there was no evidence who paid them during the interval between 1838 and the execution of the sub-grants. The Land Commission now contended that the liability for the tithe rentcharges was transferred by the Act of 1838 to the vendor's predecessor in title as owner of the first estate of inheritance, and ought to be redeemed out of the purchase-money. The vendor contended that the liability remained in the sub-grantees (the purchasing tenants), who should continue to pay them as heretofore. It was stated that the tenants admitted liability, and were prepared to continue the payment.

D. M'C. Mahony, for the Irish Land Commission:—

The question is whether the tithe rentcharges should or should not be redeemed out of the purchase-money—in other words, had the vendor at the time of sale the responsible estate within the Tithe Rentcharge (Ireland) Act, 1838 (1 & 2 Vict. c. 109), or did the interests of the purchasing tenants constitute such responsible estate? If the vendor had the responsible estate, there should be redemption out of the purchase-money; if the purchasing tenants' interests were then liable, this liability would continue on the lands after the fee-simple became vested in the purchasers. Two main legal questions arise—1. Has a sub-tenant of bishop's lands, holding under a lease with a toties quoties covenant for renewal, an estate held under an instrument "containing any provision, contract, or covenant for the perpetual renewal thereof" within sect. 8 of the Act of 1838? 2. Can a liable estate under the Act be created after its date, ex. gr., as here, by a sub-perpetuity grant under the Church Temporalities Acts?

In a recent case—*Considine's Estate* (1)—similar questions arose, and this Court decided that the tithe rentcharges should be redeemed; but in that case it was shown that the amounts of the tithe rentcharges had as a matter of fact been added in determining the amount of the rents to be reserved on the sub-grants, so that in reality the purchase-money in Court included the redemption value of the rentcharge. In the present case the Land Commission cannot show that in fact the amounts of the rentcharges were added, and that decision cannot be relied upon as conclusive on the general question.

In this case it is immaterial to the Land Commission whether or not the rentcharges are redeemed, provided (if they are not redeemed) the continuing liability of the lands is established; but the questions arising are of very general application, and the Land Commission desire an authoritative decision on them for their guidance in other cases.

Taking the two codes—the Tithe Acts and the Church Temporalities Acts—and the facts in this case together in chronological order:—Prior to 1823 the vendor's predecessors held under bishop's leases for twenty-one years, customarily renewable, and their sub-tenants, holding under leases with toties quoties covenants for renewal, were in occupation. Tithes in kind were then payable by the occupiers.

(1) E. C. 6227—Unreported

In 1823 Goulburn's Act (4 Geo. 4, c. 99) authorized the establishment for twenty-one years of compositions for tithes, which by sect. 34 were payable by the occupiers. Sect. 41 provided that subsequent lettings at rack rent should be made free from the payment of tithes during the continuance of the composition; but that had no application to the present case, as the substantial fines here show that the rents were not rack rents: see O'Leary, Composition for Tithes, p. 25; O'Leary, Rentcharges in lieu of Compositions, p. 157. By the same section every such lease should provide that in case the composition should cease during its continuance, the rent reserved should be reduced by the amount of the composition. Thus from the beginning, whenever there was a change of liability, a money adjustment as between landlord and tenant was provided for. Accordingly, after 1823 the sub-tenants continued liable.

By Stanley's Act (2 & 3 Wm. 4, c. 119—16 August, 1832) the compositions were made perpetual. Section 12 enacts that no tenant at will or from year to year shall be liable for composition accruing due after 1st November, 1833, but that the person having the first greater estate shall be liable, and provides for the transfer, on the expiration of such first greater estate, of liability to the next greater estate, and so on until the liability shall attach upon the person having the fee, who is to remain for ever subject thereto. By a further proviso, if such tenant at will or yearly tenant should continue in possession after 1st November, 1833, without any new agreement, the landlord should be entitled to recover from him, in addition to the rent, the amount of the composition, to be recovered as if it were part of and added to said rent. That section altered the liability in existing tenancies, but not until more than a year after the Act, and at that time a landlord could terminate a yearly tenancy by a six months' notice, and then re-let at an increased rent, and the statute provides for an automatic addition to the rent in case he does not do so: see O'Leary, Comp., p. 35. Here again there is a money adjustment on a change of liability. Moreover, the transfers of liability affected by the section are in an ascending scale until the fee is reached, the owner of which is thenceforth to remain for ever liable: there is no transfer in a downward direction, no provision for the subsequent creation of a liable estate—the fee once subject to the composition remains so always: see O'Leary, Comp., p. 41.

Section 13 makes future lessees free from payment of composition, but this does not apply to a renewal pursuant to contract (section 14). The former section applied to a bishop's lessee (O'Leary, Comp., p. 26), but sub-lessees, having toties quoties covenants, came within sect. 14, and continued liable: O'Leary, Comp., pp. 98, 99.

After Stanley's Act, accordingly, the sub-tenants here continued liable for the composition.

The next statute was the first Church Temporalities Act (3 & 4 Wm. 4, c. 37, 14th August, 1833), sects. 129, 162, and 163 of which in effect removed the contradiction or anomaly, if any, from sect. 13 of Stanley's Act applying to bishops' immediate lessees. Other provisions necessary to refer to are: sects. 32, 36, 128, 130 (new rent to be the old rent plus the average of fines), 149 (conveyance to be deemed a renewal). This Act did not alter the liability of the sub-tenants, nor did the renewal to Jones on the 23rd June, 1835, nor the perpetuity grant to him of 20th July, 1836, do so: the sub-tenants remained liable.

The third of the Church Temporalities Acts (6 & 7 Wm. 4, c. 99) was passed on the 20th August, 1836, and by section 1 it provides that an inferior tenant holding by lease containing a toties quoties covenant for renewal, whose landlord has acquired a perpetual estate or interest under the previous Acts, may apply to him for a conveyance of a perpetual estate and interest. There is a marked contrast between the two interests mentioned—a person holding under a lease with a toties quoties covenant for renewal may apply for a conveyance of a *perpetual estate and interest.* Section 2 provides that the new rent shall be the old rent plus the fine or average fine. The Act makes no change in respect of liability for composition, nor would sub-grants under it have altered the existing liability of the sub-grantees as occupiers.

Accordingly, in 1838 the sub-tenants were still liable for the compositions.

Then came the Tithe Rentcharge (Ireland) Act, 1838 (1 & 2 Vict. c. 109, 15th August, 1838), of which the preamble and

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sects. 7, 8, 9, 10, 12, and 54 ("land") are the chief provisions affecting this case.

Jones, at the passing of that Act, had the first estate of inheritance, and this was the responsible estate, unless there was under it or derived therefrom a perpetual estate or interest, as defined in sect. 8. That section enumerates three classes of case. These are not overlapping or contradictory. Each is a class by itself. The estates of the sub-tenants did not come under class 2 or 3. Did they come under the first class? The Land Commission say not. In the first place, the third class relates to See lands, and, it is submitted, is the only one dealing with such property. That provision shows an intention that in all See lands the immediate tenants are to be liable, and not the sub-tenants. Accordingly the sub-tenants could not come under class 1. In the next place, on the wording of the section itself as regards class 1, the estates of the sub-tenants here were not estates or interests held under any deed or instrument containing any provision, contract, or covenant for the perpetual renewal thereof. This last question involves two considerations: (*a*) what is a covenant for perpetual renewal? (*b*) what were the covenants in this case, and what were the rights under them? As regards (*a*), see Furlong's Landlord and Tenant (original edition, 1845), pp. 244, 258; leases for lives with covenants for renewal for ever confer a legal estate for the lives, accompanied by an equitable agreement binding the reversioner to grant new leases for ever, and were treated as perpetual interests, and made the subject of settlements, mortgages, &c. The lessor must have the absolute ownership; a lease renewable for ever cannot be granted out of a less estate than the fee-simple: Lyne, Leases for Lives, p. 69; a person seised of the absolute interest in such a lease may make a derivative lease, with a similar covenant, which shall bind his representatives: ibid., p. 70; such covenants bind assignees of the reversion: ibid., pp. 123, 124. See, further, the Renewable Leasehold Conversion Act (12 & 13 Vict. c. 105), sect. 38, "lease in perpetuity." The covenant under sect. 8 must be a real and effective covenant, with an estate to feed it: see O'Leary, Rentcharges, p. 72.

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With respect to (*b*), the sub-tenants here had merely toties quoties covenants, to renew as often as the vendor's predecessor obtained a renewal from the bishop. This did not give them the right even to compel their lessor to endeavour to obtain a renewal: see Lyne, Leases for Lives, p. 129; Lyne, Ecclesiastical Leases, pp. 133, 134. In *Evans* v. *Walshe* (1) the defendant had taken a renewal, and the decision in *Davis* v. *Hone* (2) was on the basis of a renewal of the head lease. Moreover, the vendor's predecessors had not themselves a perpetual estate; the bishop could not bind his successors by a covenant for renewal, and his lessee had no right of renewal: 10 & 11 Car. 1 (Ir.), sess. 4, c. 3, sects. 1, 2; Lyne, Leases for Lives, p. 70; Lyne, Ecclesiastical Leases, pp. 3, 4, 111; and the bishop might have increased the fine to any amount; in *Revell* v. *Hussey* (3) the bishop raised it from £90 to £3,000. That a bishop's lessee had no such right is made perfectly clear by the provisions as to purchase-money in the Church Temporalities Acts. Under the Renewable Leasehold Conversion Act, where the tenant had an absolute right to renewals in perpetuity, the fee-farm rent is the old rent plus the value of the fines. Under the Church Temporalities Acts, the perpetuity rent is the old rent plus the fine, but the tenant must, in addition, pay a large sum as purchase-money for obtaining the grant at that rent; if he were already entitled to an annual renewal on payment of a fine, he would not have to pay purchase-money in addition. How could a sub-tenant whose interest is derived out of that of the bishop's immediate tenant have a perpetual estate? Not only is the toties quoties covenant not a covenant for perpetual renewal, but no covenant by a bishop's lessee could give a sub-tenant a perpetual estate: see O'Leary, Rentcharges, pp. 71, 72. In *Henderson* v. *Dean of Londonderry* (4) all the lives were gone, and the principal question was as to the liability of the yearly tenancy. As regards the present question, the case is quite different from this, as there the head lease was not from a bishop, but from an owner in fee, and it contained an absolute covenant for perpetual renewal; there was an estate in equity to feed the

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(1) 2 Sch. & Lef. 519.

(2) 2 Sch. & Lef. 341.

(3) 2 B. & B. 280.

(4) 2 Craw. & Dix. 494.

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toties quoties covenant, whereas here there was no such covenant by the bishop, and there could not have been such. Further, it is submitted that the decision is wrong. The judgment proceeds on the words "any provision, contract, or covenant" in sect. 8 of the Tithe Rentcharge Act, but leaves out for what—"the perpetual renewal thereof."

Further, although, as before shown, the obligation of a covenant for perpetual renewal runs with the reversion, a toties quoties covenant by a bishop's lessee is personal only. See Furlong (1845), p. 305: *Haig* v. *Homan* (1). The meaning and reason of this distinction apparently is that the covenant to renew can bind only the estate which the covenantor had at the time; it could not affect a further or other interest subsequently acquired by him. Here Jones, at any time before his perpetuity grant, had no estate or right to anything beyond the then existing head lease for twenty-one years—that alone could be bound by a covenant, and his interest under any further renewal would not be affected. See Lyne, Leases for Lives, pp. 125–127, quoting from the judgment of Lord Clare L.C. in *Duchess of Chandos* v. *Brownlow* (2); *Brereton* v. *Tuohey* (3); *Muller* v. *Trafford* (4).

The fact that Jones in 1836 had obtained the perpetuity grant, and the provisions of section 149 of the Church Temporalities Act of 1833, do not bring the sub-tenants within sect. 8 of the Tithe Rentcharge Act. In the first place, these provisions cannot alter the nature of the covenants *contained* in the sub-leases; secondly, the rights given by section 149 and subsequent sections are quite different from the rights under a covenant for perpetual renewal. The strict interpretation bears out the intention indicated in sect. 8, class three—that the bishop's immediate tenant is to be liable, and not the sub-tenant.

Accordingly, Jones had the first estate of inheritance under sect. 7 of the Tithe Rentcharge Act. There was no perpetual estate or interest as defined by sect. 8 under or derived from it, and his estate became the estate liable to the rentcharge under the Act. As, however, if the Act had not passed, the sub-tenants would have continued liable for the compositions, sect. 10 applied, and under it an annual sum equal to the rentcharge became payable to Jones by the sub-lessees as additional rent, and as if reserved by the sub-leases. This provision is similar to the last proviso in sect. 12 of Stanley's Act, and is a further instance of money adjustment where liability is shifted. That this annual sum is rent, and that the rent thenceforth payable under the sub-leases is the increased amount, see *Cusack* v. *Kavanagh* (1). Accordingly, after the Tithe Rentcharge Act, Jones was directly liable to the owner of the rentcharge, but the rents of the sub-tenants were increased by the amount of that liability. Whether on the passing of the Act Jones paid the rentcharge, and collected the additional amount from the sub-tenants, or they paid the tithe-owner direct three-quarters of the previous compositions, the Land Commission cannot say, but the mode of payment could not affect the legal liability for the rentcharge or alter its incidence.

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(1) 4 Bligh, N. S. 380, at pp. 420, 421, 423.

(2) 2 Ridg. P. C. 345.

(3) 8 I. C. L. R. 190.

(4) [1901] 1 Ch. 54.

Section 12 of the Act of 1838 is a further instance of the money adjustment, and sect. 54 provides that the word "land" shall extend to hereditaments; it accordingly includes the rent reserved by a perpetuity grant.

Next came the sub-perpetuity grants of 1839, 1840, 1841, and 1842. It is submitted that these did not alter the liability imposed by the Act of 1838; that the responsible estate must be one which was existing at the passing of the Act. The Act contains no provisions for creating new responsible estates—no provisions for the descent of liability, a devolution downwards. Sect. 9 provides for transfer of liability upwards, as in sect. 12 of Stanley's Act, under which the fee once reached is to remain liable for ever. The estate of inheritance in sect. 7 must have been one existing at the passing of the Act. The lands in each such estate are subjected to one entire rentcharge; no new rentcharge can be created. Sect. 8, class 2, also confirms this view, and shows that 1838 was the determining date; the interest under a lease after the Act for 900 years would not be a liable estate. On this question the judgment of Sir Andrew Porter M.R. in *Connolly* v. *Gorman* (2) is very important.

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(1) I. R. 9 C. L. 90.

(2) [1898] 1 I. R. 20.

[*Begley*, for the vendor:—I do not contend that the taking out of the sub-grants affected the previous liability.]

Mahony:—That simplifies the case, and, it is submitted, reduces matters to the one question: whether in 1838 the sub-tenants held under deeds or instruments containing any provision, contract, or covenant for the perpetual renewal thereof; and this question cannot be affected by the new and different rights conferred subsequently to the leases by the Church Temporalities Act, 1833, sect. 149, and subsequent sections.

Begley, for the vendor:—

It is agreed that in 1833 the occupier was liable, and that liability was not shifted till the passing of the Act of 1838, and I submit that Act did not alter the liability; it remained on the occupier. Under sect. 17 of Stanley's Act (2 & 3 Wm. 4, c. 119) either landlord or tenant could undertake payment of the composition, and an agreement for payment by the tenants should be presumed in this case: *Bomford's Estate* (1). I submit that the occupiers were liable all the time; if so, sect. 10 of the Act of 1838 has no application. If the incidence is not shifted, there is not one complete tithe rentcharge on the landlord's estate; it remains as it was: a divided charge on each of the occupiers. Does a tenant with a toties quoties covenant for renewal hold on for ever if his landlord never requires a renewal? In 1836 Jones got the full estate, which fed his covenant. The Church Temporalities Act passed the same year, entitling sub-tenants to sub-perpetuity grants, made them equitable owners in fee, or, at all events, gave them the right to call for an equitable fee-simple. A lease made by the bishop in excess of his powers is not "void;" it is only "voidable." A lease renewable or for lives was good against the bishop himself, voidable only by his successors, who could, however, confirm it if they liked. Renewals became stereotyped, and customary renewals were recognized by statute: 3 & 4 Wm. 4, c. 37, ss. 45, 161; 6 & 7 Wm. 4, c. 99, s. 18. Sect. 34 of Goulburn's Act made the occupier liable, and he continued liable under sect. 12 of Stanley's Act; and under sect. 7 of the Act of 1838 he still remains liable if he has the first estate of inheritance

(1) 38 I. L. T. R. 139.

or other estate equivalent to a perpetual estate or interest as subsequently defined. I submit that the occupiers have both a perpetual right to renewal and also the first equitable estate of inheritance. The vendor, having bought the fee-simple in 1836, was bound to renew under his toties quoties covenant; he had no option: Lyne, Ecclesiastical Leases, pp. 130, 131. The toties quoties covenant had, in fact, become a covenant for perpetual renewal. Sect. 152 of 3 & 4 Wm. 4, c. 37, shows that the under-tenant has the equitable right in fee. If I am right, the case is within sect. 8 of the Act of 1838, and the landlord was in the same position as he was before the passing of the 1838 Act, when admittedly the occupier was liable. In any event, the long course of dealing brings the case within *Bomford's Estate* (1) and *Delap's Estate* (2). The tenants have always paid, and are willing to continue to pay. Why should the Land Commission, a mere tax-collecting body, step in?

Mahony, in reply:—

Sect. 17 of Stanley's Act has no application to the present case. It was intended to enable landlords not themselves liable for the composition to undertake the collection of same from their tenants in consideration of being allowed to deduct from the tithe-owner 15 per cent. on the amount of the composition. The subsequent sections, 18 to 26, prescribe the necessary proceedings to be taken to effectuate this. The matter is fully dealt with in O'Leary, Comp., under the heading "Undertaking Landowners," pp. 83–100; and O'Leary, Rentcharges, under the title "Undertaking Landlords," pp. 75–87. There is no pretence that in this case the necessary proceedings were ever taken; that any certificate was ever given or registered, or that the composition paid was ever abated or reduced by the 15 per cent. In *Bomford's Estate* (1) there was originally no liability, direct or indirect, on the grantees to pay the amount of the quit rent to any person—they had, in fact, paid it for over one hundred years—there was no explanation why they had done so; and an agreement had to be presumed. In this case, if the vendor's predecessor became liable under the Act of 1838 to the rentcharge, he was entitled to recover the same amount from his sub-tenants as additional rent, and it would have made little difference whether he paid the rentcharge and recovered the amount over from his tenants, or allowed them to pay the tithe-owner direct. If the latter was what took place, then, for the entire period, the vendor and his predecessors have not paid one penny less, nor the sub-tenants one penny more, than they were liable for according to the Land Commission's contention; it was simply a difference in the mode of payment. This is the explanation which was wanting in *Bomford's Estate* (1). Such a course of dealing was not inconsistent with the legal liability of the vendor to the tithe-owner, and could not alter it. It is the question of that liability that now arises; arrangements between the vendor and his tenants do not affect the matter. *Delap's Estate* (2), so far as it has any bearing on the present case, is in favour of the Land Commission's contention; a reasonable explanation of the course of dealing there is that on the passing of the Tithe Rentcharge Act the case was treated as coming within sect. 8 of that Act, class 3, in which case the liability was transferred to Delap, and his sub-tenant became liable for the additional rent under sect. 10.

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(1) 38 I. L. T. R. 139.

(2) [1912] 1 I. R. 298.

The Church Temporalities Act, 1836, did not make the sub-tenants equitable owners in fee, or give them the right to call for an equitable fee-simple. It gave them a right to *purchase* the fee at a price to be determined according to the provisions of that Act and the Act of 1833, viz., a contribution to the purchase-money paid by the immediate tenant according to the respective values of their respective interests, the amount, if necessary, to be ascertained by the Court of Chancery. It is quite immaterial whether a bishop's lease was good against himself and only voidable by his successor; the point is, it was not binding in perpetuity. It is said renewals became stereotyped, and customary renewals were recognized by statute. Yes, as such; but, so far from a right being recognized, the fact that large purchase-money was payable for what was in effect a renewal for ever was a recognition of the fact that there was in reality no such right.

(1) 38 I. L. T. R. 139.

(2) [1912] 1 I. R. 298.

It is further contended that the sub-tenants had the first equitable estate of inheritance under the Act of 1838, but if this were so, sect. 8, class one, of the Act would be mere surplusage. They do not even come under that class; the vendor's predecessor was not bound to renew under the covenant. He became bound to renew, and had no option by reason of an entirely new and different right conferred on the sub-tenants by the Church Temporalities Act, 1833, and provided a condition of that right, the payment by the sub-tenants of their contribution to the purchase-money, was performed by them: see sects. 152, 153. If the sub-tenants failed to perform the condition, they became for ever barred from all right under their covenants, sect. 154. The covenant not only was not itself a covenant for perpetual renewal, but it had not even in fact become so. The tenant had no right to a renewal. He had a right to buy it at a price over which he had no control.

It is also said that the purchasing tenants are willing to pay in the future, but there is nothing to show that they or their successors will be bound to do so. Any of them may at any time repudiate liability. Save that the notice of the original ruling of the final schedule is stated to have been served on the tenants, and that it contained some reference to the Land Commission claim against the purchase-money, the tenants have no notice of this proceeding, and are not before the Court. The question is one of legal liability between the Land Commission on the one side, and the vendor or his tenants on the other—which of the latter had at the time of sale the responsible estate? This question is of vital consequence to the Land Commission, not only in this matter, but as governing the many other similar cases.

Cur. adv. vult.

May 3.

Ross J.:—

The question for decision is whether certain ecclesiastical tithe rentcharges hitherto paid by nine of the purchasing tenants are to be redeemed and payment made out of the purchase-money, or whether the purchasing tenants are to continue to pay them to the Land Commission as before. The purchasing tenants do not in any way deny their liability, and are satisfied to go on paying as heretofore. The Land Commission do not care whether they are redeemed, or whether the tenants continue paying them as before; but they desire a decision on the point. They say that there is a danger that some of these tenants, or others similarly situated, may repudiate their liability at a time when the purchase-money has been taken out of Court.

It is contended on their behalf that the estate of the predecessor of the vendor, who purchased the fee-simple of his estate in July, 1836, is alone liable. It is, no doubt, an extraordinary position that the tithe-collector should now intervene as between the two parties, who are agreed as to their respective obligations. The subject is complicated and difficult. Prior to 1836 the vendor's predecessor held under leases for twenty-one years from the Bishop of Derry, renewable by custom. In the year 1836 the lessee from the bishop, Theophilus Jones, the predecessor in title, acquired a perpetuity grant under the provisions of sect. 128 of 3 & 4 Wm. 4, c. 37, the first of the Church Temporalities Acts.

The predecessors of the purchasing tenants hold under leases made in 1740 and 1826 from the immediate lessee of the bishop for twenty-one years, with the usual toties quoties covenants for renewal. About 1839 and 1840, after the Tithe Rentcharge Act of 1838, the sub-lessees took out sub-perpetuity grants under 6 & 7 Wm. 4, c. 99. Prior to 1838 the compositions in lieu of tithes were paid by the sub-lessees, being occupiers, under the provisions of Goulburn's Act, passed in 1823, and Stanley's Act, passed in 1832. Since 1838 the tithe rentcharges have in fact been always paid by the sub-lessees, who subsequently obtained sub-perpetuity grants. The Land Commission contends that the liability for the tithe rentcharges was transferred by the Tithe Rentcharge Act of 1838 to the vendor's predecessors in title as owners of the first estate of inheritance, and ought to be redeemed out of the purchase-money. The vendor contends that under the provisions of the Tithe Rentcharge Act the liability for the tithe rentcharges remained on the sub-lessees, and that the purchasing tenants should continue to pay them as heretofore. Both counsel are agreed that the passing of the Tithe Rentcharge Act is the crucial date for determining the liability. At this date we must bear in mind that the vendor's predecessors held under perpetuity grant, and the purchasers' predecessors under leases for twenty-one years with toties quoties covenants for renewal.

I propose to examine the arguments on each side and the authorities cited. *Considine's Estate* (1), decided by me, is admitted by Mr. Mahony not to be an authority for this case, because in that case the tithes had been added to the rent, and the purchase-money was increased by that addition. In the present case they were never added to the rent. Mr. Mahony points out on the sections in Goulburn's Act, and Stanley's Act, and the Church Temporalities Acts, that the sub-lessees were bound to pay the tithes down to 1838, and that whenever a statute provided for a change in the liability to the tithes, it also provided for pecuniary adjustment. The transfer of liability has always been from a lower to a higher interest in the land. He then goes on to consider sect. 8 of the Tithe Rentcharge Act of 1838. It defines what estates are to be deemed equivalent to perpetual estates. They are three in number: first, any estate or interest held under any deed or instrument containing a provision or covenant for perpetual renewal thereof; secondly, any estate or interest held for any term of years whereof at least one hundred shall be to come and unexpired on 30th of October, 1838; thirdly, any estate held by lease or demise immediately from and under any bishop or ecclesiastical person.

Mr. Mahony denies that this case can come under any of the three classes except the third. He says that a lease for twenty-one years, with a toties quoties covenant for perpetual renewal, will not convey an estate equivalent to a perpetual estate within the meaning of this section. A covenant for perpetual renewal would appear to mean an absolute covenant and not a contingent covenant; and, secondly, it would appear to mean a covenant which the lessor was empowered to make. The lessor must be understood to have sufficient estate to feed his covenant. A futile covenant outside the power of the lessor would not appear to be intended. Mr. Mahony contends that the sub-lessees had no estate or interest held under a deed or instrument containing any provision, contract, or covenant for perpetual renewal thereof.

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(1) E. C. 6227—Unreported.

There is a great difference between a covenant for perpetual renewal and a covenant for a toties quoties renewal. A covenant for perpetual renewal binds the reversioner and remainderman. It is an inherent covenant, and runs with the land (1). A toties quoties covenant, on the other hand, does not run with the land, and is merely personal: *Haig* v. *Homan* (2). Mr. Mahony asserts that a bishop was not bound to renew. I am not quite sure that he was, but he certainly appears to have been able to insist on extravagant renewal fines as a condition of renewal: Furlong (ed. 1845), p. 305. If a middleman neglects to renew, it may not be a breach of a toties quoties covenant with a sub-lessee, but if the middleman's covenant to renew with his under-tenant be absolute, the failure of the middleman to renew with the head landlord is a breach of that covenant. Mr. Mahony seemed to question the decision of *Henderson* v. *Dean of Londonderry* (3). One of the Longford family being seised in fee, conveyed to Lord Londonderry for three lives, with a covenant for perpetual renewal. He conveyed to one Campbell at a profit rent for the same lives, and covenanted to renew as often as he obtained a renewal. Campbell conveyed similarly to Thompson. Thompson's interest vested in Burnside, who in a similar manner conveyed to a lady called Dunn by way of mortgage. She married Henderson, who went into possession as mortgagee. There was no renewal, and all the lives were dead. Mr. Baron Pennefather says as follows:—"Let us see if there be a covenant for perpetual renewal in the deed under which he derives within the meaning of the 8th section of 1 & 2 Vict. c. 109. The words in the 8th section, 'any provision, contract, or covenant,' are very strong, and I think mean such a covenant as may be made available." He then proceeds to hold the mortgagee in possession answerable as his tenant. The decision seems to me, speaking with great respect of a Judge so eminent, plainly right; and I have difficulty in seeing how it affects this case, because the original covenantor was seised in fee.

Mr. Begley, on the other side, contends that the purchaser's predecessors were liable in 1838, and continue liable to the present

(1) Lyne, Leases for Lives, pp. 69, 70, 123.
(2) 4 Bligh, N. S. 380.
(3) 2 Cr. & Dix, 494.

time. His main ground is based on the 149th section of 3 & 4 Wm. 4, c. 37, which provides that a conveyance of the fee-simple to the immediate lessee from a bishop operates as a renewal from time to time of the lease from the bishop as regards the toties quoties covenants for renewal in inferior tenants' leases. Consequently, by operation of the statute the sub-lessees' covenants for toties quoties renewal became in effect covenants for perpetual renewal, and the sub-lessees became possessed of the estate or interest held under a deed or instrument containing a provision, contract, or covenant for the perpetual renewal thereof. This is equivalent to a perpetual estate within the meaning of the 8th section of the Tithe Rentcharge Act. Further, the sub-lessees had an equitable right to the fee, and consequently an estate of inheritance. This argument seems to me to be sound, and I cannot see that it is really impaired by the fact that they had to pay part of the purchase-money to the bishop. I think their contentions afford a solution to the difficulty. However that may be, for more than eighty years the purchasing tenants have been paying these tithes; and Mr. Begley asks me in these circumstances to presume a lost deed. Mr. Mahony meets this by saying that the person liable to tithe rentcharge cannot legally contract to throw the liability on another, and therefore no grant could have had a lawful origin. He suggests that, instead of the tithe being added to the rent, as it ought to have been, the sub-lessees handed it direct to the tithe-owners by arrangement with the lessors. On this point we are left without evidence, and in that state of affairs, apart from the reasons already given, it would be unwise to disturb the effect of a user that has gone on for eighty years.

I am, therefore, of opinion that the purchasing tenants continue liable as before, and that this application for the redemption and payment out of the purchase-money should be refused with costs.

Solicitor for the Land Commission: *Henry M. P. Hare.*
Solicitors for the vendor: *Wilson & Simms.*

T. C. T.

Powell J.
1921.
June 6.

IN RE KINAHAN'S TRUSTS; HAMILTON AND BOWLES v. HUDSON-KINAHAN.

(1921. No. 524.)

Trustees—Trust estate—Insurance of trust property—Premium to be paid out of capital moneys—Sanction of Court—Jurisdiction.

On the application of trustees for the purposes of the Settled Land Act, 1882, the Court authorized the payment out of capital moneys of the premium on an insurance of a mansion house against damage or fire arising out of riot or civil commotion, the subject-matter of the trust, situated in a disturbed district.

ORIGINATING SUMMONS in the matter of the trusts of the will of Edward Hudson Kinahan, late of Dundrum, Co. Dublin, baronet, deceased. The testator, by his will dated 21st February, 1889, devised and bequeathed to his trustees, whom he thereby appointed to be trustees for the purposes of the Settled Land Act, 1882, all the land and hereditaments devised and bequeathed to him by the will of Henry Hudson, of Glenville, to the use of the defendant, Sir Edward Hudson Kinahan, his eldest son, for his life, with remainder to the use of his first and other sons in tail male, with remainder to the testator's other sons as therein expressed, with remainder to his trustees, to be held by them upon the trusts declared concerning the testator's residuary, real, and personal estate upon trust that the trustees should out of the rents and profits pay the rents payable in respect thereof, and observe and perform the covenants and conditions on the part of the lessees to be observed; and as to the residue of his estate real and personal, the testator devised and bequeathed the same to his trustees upon trust for sale, conversion, and investment, and to pay the interest or other annual produce thereof to his wife for life, with remainder upon trust for all or any one or more of his children as his wife should by deed or will appoint, and in default of such appointment upon trust for all his children, who being sons should attain the age of twenty-four, or being daughters should survive the testator, in equal shares.

By indenture dated 31st December, 1915, the plaintiffs, Willoughby J. Hamilton, Spotswood Bowles, and George H. Bowles were appointed trustees of the will in the places of trustees who had died. The freehold property included in the said devise consisted of tenanted lands which had been sold under the Irish Land Acts, 1903 to 1909, and the proceeds were now represented by the securities set out in the schedule to the last-mentioned indenture. The property also comprised the mansion-house of Glenville, situate in the County of Cork. Under the provisions of the will the defendant was now entitled for life to the mansion-house, and under a codicil to the will the defendant was absolutely entitled to all the furniture and household effects therein. The mansion-house was the family residence attached to the baronetcy, and kept up as such. The mansion-house had lately been raided by armed men. It was at present insured against ordinary fire risks in a sum of £8,000, and the furniture was insured by the defendant in a sum of £9,500. These risks did not include damage and fire arising out of riot and civil commotion or malicious acts of arson. Owing to the present condition of the country, and the fact that several mansion-houses in the County of Cork had been lately maliciously destroyed by fire, the defendant himself urged the trustees to make the additional insurance, which the trustees were desirous to do, if empowered to do so by the Court. They had obtained from underwriters at Lloyd's a quotation to insure the additional risks for a sum of £10,000 for one year at a premium of £200. The trustees and the defendant felt that, owing to the unusual nature of the insurance, it would not be reasonable that the tenant for life should pay the entire premium on the insurance in respect of the mansion-house, and proposed to effect an insurance for one year, and to pay the premium out of such capital fund as the Court should deem proper, the most appropriate fund being that representing the purchase-money of the real estate, subject to the same trusts as the mansion-house. The defendant, the tenant for life, was unmarried. The expenses of upkeep of the mansion-house were very heavy, and exceeded any profits produced by the lands attached to it, and the defendant was unable to pay the premium out of his own income.

Phelps, for the plaintiffs, the trustees :—

We ask the Court to sanction the payment of this premium out of capital as a salvage payment. "In some cases the Court authorizes dealings with the trust property which are not authorized by the terms of the trust, where they are imperatively required for the preservation or salvage of the trust property": Halsbury, vol. xxviii, p. 180. The trustees and not the tenant for life are bound to insure against fire: *Kingham* v. *Kingham* (1). This is an unexpected emergency not anticipated by the author of the trust, and in such a case the Court will sanction the acts proposed to be done by the trustees: *In re New* (2); *In re Quicke's Trusts* (3).

O. Murphy, for the defendant, the tenant for life, and for certain of the remaindermen, consented to the application.

POWELL J. :—

I have no doubt whatever that I have jurisdiction to make the order, having regard to the emergency that has arisen. Romer L.J., in *In re New* (2), at p. 544, says: "In the management of a trust estate, it not infrequently happens that some peculiar state of circumstances arises for which provision is not expressly made by the trust instrument, and which renders it most desirable, and it may be even essential, for the benefit of the estate and in the interest of all the cestuis que trust, that certain acts should be done by the trustees which in ordinary circumstances they would have no power to do. In a case of this kind, which may reasonably be supposed to be one not foreseen or anticipated by the author of the trust, where the trustees are embarrassed by the emergency that has arisen, and the duty cast upon them to do what is best for the estate, and the consent of all the beneficiaries cannot be obtained by reason of some of them not being sui juris or in existence, then it may be right for the Court, and the Court in a proper case would have jurisdiction to sanction on behalf of all concerned such acts on behalf of the trustees." In the present case, I am satisfied that an emergency has arisen. A duty is cast on the trustees, and it is right for the Court "to sanction on behalf of all concerned" the acts proposed to be done. In ordinary circumstances the trustees would not be justified in doing what is supposed in this case, but in the circumstances I am satisfied that I have jurisdiction to make the order, and I therefore sanction the payment of this insurance premium out of capital, that is to say, out of the proceeds of the sale of the lands.

Solicitors for the parties: *R. A. Beauchamp & Orr.*

D. M. S.

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(1) [1897] 1 I. R. 170. (2) [1901] 2 Ch. 534. (3) [1908] 1 Ch. 887.

BAGGE *v.* BAGGE.

(1921. No. 366.)

Ross J.
1921.
June 21, 27.

"Will"—Express reference to will (subsequently revoked) of another person—Power to charge portions for younger children—Charge by will in favour of son who predeceased testator—Lapse—Destination of lapsed portion—Trust in default of appointment—Hotch-pot.

A testatrix left the residue of her property to trustees on trust to pay the income to her daughter until the latter should "actually acquire a vested interest in possession, and a present right to receive the several legacies and benefits bequeathed and limited to her" under her father's "will." The testatrix having predeceased her husband, the latter revoked the "will" referred to in his wife's will.

Held that, under her mother's will, the daughter became entitled to the residue absolutely.

S. B. by his will put certain lands in settlement, and empowered the tenant for life, J. H. B., to charge thereon portions, not exceeding £2,000 in all, for younger children. In exercise of this power, J. H. B. by will charged £2,000 on the settled lands, and appointed this sum in favour of his two sons R. B. and W. B. equally.

Held that, on the death of R. B. in his father's lifetime, the sum of £1,000 appointed in his favour sank into the inheritance.

By a settlement made on the marriage of J. H. B. and H. I. O., J. H. B. settled a policy of assurance on his life for £6,000 (represented on his death by policies for £6,085) in trust after his death for his younger children in such shares as the settlor should appoint, with the usual trust in default of appointment equally, and hotch-pot clause. The settlor by his will appointed £500 in favour of R. B., £500 in favour of W. B., and the residue in favour of I. M. B. R. B. having predeceased his father:

Held, that the testator was dealing with a definite and ascertained sum, and that consequently the share appointed to R. B. did not fall into the residue, but passed as in default of appointment and by the operation of the hotch-pot clause to the personal representative of R. B.

Originating Summons.

John Henry Bagge in the year 1876 married Harriet Isabel Odell. The wife died on 18th August, 1903; the husband on the 23rd June, 1917. There were four children of the marriage—

namely, the eldest son, the defendant John Leonard Bagge, Ralph Bagge, the defendant William Dermot Bagge, and the plaintiff Isabel Muriel Bagge, all of whom attained twenty-one years of age. Simon Bagge, the father of the said John Henry Bagge, by his will dated 16th January, 1869, devised extensive freehold and leasehold estates to the use of his eldest son, the said John Henry Bagge, for life, with remainder to his first and other sons in tail male, with devise remainders over. The will empowered the said John Henry Bagge to charge portions not exceeding £2,000 for his younger children, either before or after marriage, by deed or will, and to appoint the hereditaments for a term of years in trust to raise such portions. The testator died on 9th November, 1872. By a settlement made on the marriage of the said John Henry Bagge and the said Harriet Isabel Odell on 10th August, 1876, the husband assigned a policy of insurance for £6,000 on his life to trustees, on trust after his death, subject as therein stated, to hold the same for the younger children in such shares as the said John Henry Bagge should by deed or will appoint, and in default of appointment in trust for the said younger children, with the usual provision for hotch-pot. The policy was surrendered in the year 1897, and fresh policies for sums amounting to £6,085 were substituted therefor, and became subject to like trusts. The plaintiff James Robinson was at the date of the summons the sole surviving trustee of this settlement.

The said Harriet Isabel Bagge made her will on 13th of January, 1903, and after making specific bequests, she devised and bequeathed all her real and personal property to her trustees in the following terms :—" Upon trust to pay the interest, dividends, and annual income of the same to my daughter Isabel Muriel Bagge until she shall actually acquire a vested interest in possession in and a present right to receive the several legacies and benefits bequeathed and limited to her under the will of my said husband, and after the happening of that event upon trust to divide the said shares equally between my daughter and my two sons Ralph and William absolutely." On the 18th of January, 1906, this will was proved by her husband. At the date of her death on 18th August, 1903, her husband had made a will and codicil dated respectively 6th of June and 13th June, 1902, by which certain benefits were given and appointed to the said Isabel Muriel Bagge, to which she would have been entitled absolutely on attaining the age of 24 years, but this will and codicil were afterwards revoked by the said John Henry Bagge. Both wills were prepared by the family solicitors, Messrs. A. and J. Robinson. By his will dated 17th June, 1914, the said John Henry Bagge, reciting the power to charge the estates under the will of his father Simon Bagge with portions for his younger children, exercised the power in the words following:—"Now, in exercise of the said power, I do hereby charge the sum of two thousand pounds upon the said estates (specifying the hereditaments), and I appoint the said sum of two thousand pounds to my sons Ralph Bagge and William Dermot Bagge as tenants in common in equal shares." The testator then went on to create a term of 1,000 years for the purpose of enabling the said portions to be raised. The will then dealt with the £6,000 payable under the policies to his younger children in the terms following:—"And whereas I am empowered by the settlement dated 10th August, 1876, and made on the marriage of my late wife, to appoint a certain sum of six thousand pounds therein mentioned, or the securities that may be representing the same, to my younger children, now, in exercise of the power thereby conferred on me, I appoint the said sum, or the securities representing the same, as follows: that is to say, the sum of £500 to my son Ralph Bagge absolutely, and £500 to my son William Dermot Bagge absolutely, and the residue to my daughter Isabel Muriel Bagge absolutely." The will then conferred a legacy of £1,000 on Ralph Bagge with other legacies. Then followed a bequest of £1,200 to Isabel Muriel Bagge, together with investments representing £4,800 invested in the name of the Public Trustee, but subject to an annuity of £175 charged thereon, and payable to a relative, Elizabeth Bagge, for life. The testator then directed the income of these bequests to be applied for the benefit of herself (Isabel Muriel Bagge), her husband, and children, and, in the event of the trusts failing, upon trusts for Ralph Bagge and William Dermot Bagge. Then followed a bequest of £2,500 for the benefit of Ralph Bagge and his wife and family, if he was married. In the event of these trusts failing, this fund was to go equally between William Dermot

Bagge and Isabel Muriel Bagge, subject to the provisions appearing in the said will.

Then followed a bequest of £2,500 to William Dermot Bagge, on which no question arose. Finally, there was an ultimate residuary claim in favour of Isabel Muriel Bagge. On the 19th October, 1915, the testator made a codicil to his will revoking the legacy of £1,200 to his daughter Isabel Muriel, but did not otherwise vary his will. The plaintiff James Robinson was the surving trustee of the will of Harriet Isabel Bagge. The plaintiff Isabel Muriel Bagge was unmarried at the date of the hearing of the summons.

Ralph Bagge was born in the year 1881, and emigrated to Canada in 1904. He subsequently went to the United States. While he was in Canada and the United States, he did not obtain regular employment. He never settled anywhere. He worked while in Canada at Brandon and Winnipeg (Manitoba), and at Calgary, Millarville, and Penhold (Alberta). While in the United States he was to be found at Lake Butter (Florida), Baltimore (Maryland), and Newport News (Virginia), down to the month of October, 1915. He used to write to his father at least three or four times a year, and his father sent him sums of money from time to time. In none of these letters did he state that he was married, or that he had any intention of being married. The last letter received from him in America by his father was dated 20th October, 1915.

On the evening of the 21st July, 1916, Ralph Bagge called at his aunt's, Mrs. Poole's, house, at Birkenhead, and had an interview with her. He was dressed in a soldier's uniform, and informed her that he had come over to England with the first Canadian contingent, and that he was attached to the 1st King's Liverpool Regiment. Mrs. Poole never saw or heard of him again. In August, 1916, he wrote to his father on notepaper of a soldiers' club in Liverpool, but with the address crossed out. The letter stated that he had no address, that he was on the move night and day, that he would if possible send his father a line from time to time, that he was then off to Northern Italy, and that he would write within three or four weeks. This letter was the last communication from him of any description that reached his family. He was always

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on the most affectionate terms with his father and family, and no reason could be suggested why he ceased writing to his father up to the date of his death in June, 1917, and to the family since that time.

Ten questions were submitted for the decision of the Court by the summons. This report deals only with those numbered 1, 2, 5, and 9; the answers to the other questions depended on matters of fact, or were included in those herein set out.

1. Ought it to be presumed that Ralph Bagge died intestate and without having been married, and, if so, when?

2. Is the interest of the plaintiff Isabel Muriel Bagge in the property comprised in the residuary gift and appointment made by the said will of Harriet Isabel Maria Bagge (*a*) an interest in the income during the life of John Henry Bagge only; or (*b*) an absolute interest; or (*c*) an interest of any other, and what nature and quality?

5. Has the charge of £2,000 created under the power contained in the will of the said Simon Bagge by the will of the said John Henry Bagge and thereby appointed to his sons Ralph Bagge and the defendant William Dermot Bagge failed, as regards the sum of £1000, being the half share thereof appointed to the said Ralph Bagge, or is such share well charged in favour of the plaintiff Isabel Muriel Bagge and the defendant William Dermot Bagge on the capital moneys in the hands of the Public Trustee, representing the lands the subject of the said power of charging?

9. Does the sum of £500 appointed by the will of the said John Henry Bagge to his son the said Ralph Bagge out of the policy moneys comprised in the above-mentioned settlement pass (*a*) to the defendant John Leonard Bagge as personal representative of the said Ralph Bagge; or (*b*) to the plaintiff Isabel Muriel Bagge; or (*c*) in any other and what manner?

Longfield, for the plaintiffs.

[On question No. 1 his Lordship found as a fact that Ralph Bagge predeceased his father, intestate and unmarried.]

On question No. 2.

Conner K.C., for Isabel Muriel Bagge in her personal capacity :—

The event contemplated in her mother's will never happened. Had the mother the father's earlier will in view? The words she used point to this specific will and nothing else. The event contemplated never happened, and cannot happen. Isabel Muriel Bagge is entitled for an indefinite period; in other words, she is entitled to the capital.

Overend K.C., for the defendant Wm. D. Bagge, contra :—

The words used do not refer to a specific existing document, but to a "will," properly so called; something that comes into operation. I submit the mother's intention was to provide an income for her daughter until she came into benefits under her father's will, and she has now come in under the second will. The words used by the mother, "a vested interest in possession and a present right to receive," &c., mean an intention to provide for the daughter until she has an income of her own.

A. V. Matheson, for the defendant John L. Bagge :—

The reference to the father's "will" prima facie contemplates the last will, which takes effect on death. It is not to be suggested that Mrs. Bagge thought her husband's will executed in 1902 irrevocable. It is more reasonable to contend that she believed her husband would provide for her daughter, and in this belief intended herself to provide for her in the meantime.

Conner K.C., in reply :—

The words "the several legacies and benefits bequeathed and limited to her" of necessity refer to an existing document.

On question No. 5.

A. V. Matheson :—There is no person to get Ralph Bagge's £1,000, and there is no default clause. I submit this sum sinks back into the inheritance.

Conner K.C.: The division fails, but the charge remains. [He referred to *Fosberry* v. *Smith* (1).] The sum having been raised, this £1,000 goes among the other children equally.

Overend K.C. adopted *Conner's* argument on this point.

A. V. Matheson, in reply:—

Fosberry v. *Smith* (1) does not apply. There was there a general power of appointment. Once the sum was charged it became part of the settlor's estate, and was given out of it to a particular beneficiary. This case is quite different. When a testator charges in favour of a particular child and the charge fails, there is no ground for suggesting that somebody else, to whom the testator never referred, should take it. [He referred to *Henty* v. *Wrey* (2).] There cannot be, so to speak, a charge "in gross" for whoever may put in a claim for it.

On question No. 9.

[*Longfield* referred his Lordship to *Page* v. *Leapingwell* (3).]

Conner K.C.: *Page* v. *Leapingwell* (3) is distinguishable. I suggest that here we have no definite and ascertained sum, but a true residue, which would capture Ralph's £5,000.

Overend K.C., contra: I submit that Ralph's £500 is not captured by the gift of the residue. This case is governed by *Page* v. *Leapingwell* (3). The £500 remained unappointed, and under the settlement it went in default of appointment to the other younger children, who were met by the hotch-pot clause; and accordingly this sum went to Ralph's representative as assets of Ralph.

A. V. Matheson: In every case it is a question of construction. Was the testator dealing with what he thought was a definite fund or not?

Cur. adv. vult.

June 27.

Ross J.:—[His Lordship having stated the facts as above set out, proceeded as follows:—]

The principal difficulty in this case arises in connexion with Ralph Bagge. The facts were fully brought before the late

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(1) 5 Ir. Ch. R. 321. (2) 21 Ch. D. 332. (3) 18 Ves. 463.

Kenny J., and he was satisfied on evidence of the death of Ralph Bagge, and a grant of administration intestate has accordingly been made to his brother, the defendant, John Leonard Bagge. It now becomes necessary to determine whether he predeceased his father or not. The law in such circumstances has been settled by several cases, and it is this: the time at which he died is not a matter of presumption, but of evidence; and the onus of proving that the death took place at any particular time lies upon the person who claims a right to the establishment of which that fact is essential: *Phené's Trusts* (1); *In re Walker* (2); *Neville* v. *Benjamin* (3). The onus of proof rests on Ralph Bagge's personal representative, and it is plain that he is not in a position to adduce any evidence to show that Ralph Bagge survived the testator. But apart from any question of onus, as an inference of fact on the evidence, I arrive at the conclusion that Ralph Bagge died intestate, without having been married, and that he predeceased his father. This finding answers the first question.

Question 2 is as to the nature of the interest of the plaintiff, Isabel Muriel Bagge, in the residuary gift and appointment made by her mother's will. This is a question of intention as expressed in Mrs. Bagge's will. It is contended on behalf of William Dermot Bagge and the personal representative of Ralph that the word "will" means the operative will and not the revoked will, and that the document referred to is not a will so long as the testator is alive. Therefore, it is said Miss Bagge's interest was determined as soon as she came into possession of benefits under her father's operative will. On the other hand, it is quite clear that Mrs. Bagge was referring to a specific document in existence executed by her husband and purporting to be his will. The words used by her are not applicable to any subsequent testamentary disposition on the part of her husband. The will actually referred to never became operative, and accordingly the event never happened which was to determine her receipt of the income. Further, it cannot happen now. Therefore she is entitled to the income for ever, and this is in effect an absolute gift of the capital.

(1) L. R. 5 Ch. App. 139.

(2) L. R. 7 Ch. App. 120.

(3) [1902] 1 Ch. 723.

Question 5 deals with the charge of £2,000 created under the power contained in the will of Simon Bagge, and exercised by the will of John Henry Bagge in favour of Ralph Bagge and William Dermot Bagge. Will the £1,000 appointed to Ralph Bagge fail, or is it well charged in favour of Isabel Muriel Bagge and William Dermot Bagge? It is contended by counsel for the latter that the charge of £2,000 is a valid execution of the power in favour of all the younger children; that the creation of the charge is one thing and the division of the charge when created is another; that the lapse of one part of the charge cannot take effect; and that the appointment enures for the benefit of the other younger children. Now, the will of Simon Bagge creates no charge in favour of younger children. It is a mere power to a tenant for life to create a charge for younger children to a limited extent. It is not obligatory, it creates no trust, it need not be exercised to the full extent or to any extent. Turning now to the will of John Henry Bagge, we find the charge of £2,000 duly created, and an appointment of the same to Ralph Bagge and William Dermot Bagge in equal shares as tenants in common. There is no trace of any intention to benefit any of the younger children other than the two named. I know of no case, and no case has been cited, to the effect that if in such circumstances one of the children failed to take an appointed portion, it passed to the other younger children. There is no intention indicated on the part of the appointor that this should take effect in favour of such younger children. The case of *Henty* v. *Wrey* (1), although not applicable to the facts of this case, contains some valuable general observations by Lord Lindley as the result of the authorities. He states, inter alia, that where the portion has not vested in the lifetime of the appointee, the portion is not raisable, but sinks into the inheritance. In this case I think the creation of the charge is dependent on and to be read with the appointment of the recipients. Consequently, when there is no appointee to take, it sinks into the inheritance.

Question 9 is conversant with the sum of £500 appointed by the will of the said John Henry Bagge to his son Ralph

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(1) 21 Ch. D. 332.

Ross J.
1921.

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Bagge out of the policy moneys comprised in the said settlement. It is contended on behalf of Isabel Muriel Bagge that this £500 passes to her under the residuary clause in the will of her father. It is now well settled that if a testator is dealing with a definite ascertained sum, the word "residue" only refers to the exact amount remaining after prior amounts are taken out, and will not catch a share that has failed: *Page* v. *Leapingwell* (1); Jarman on Wills, p. 1053, 6th ed. The question is, was this an ascertained and definite sum, and did the testator know the amount of the policy money with which he was dealing? I think there can be no doubt that the testator did know the exact sum with which he was dealing, viz., £6,085. In that case it goes in default of appointment, under the terms of the marriage settlement of 10th August, 1876, to all the younger children equally, that is, to the personal representative of Ralph and to William Dermot and Isabel Muriel. But then under the hotch-pot clause William Dermot and Isabel Muriel cannot take it, and there only remains the personal representative of Ralph, who takes it in that capacity.

Solicitors for the plaintiffs: *A. & J. Robinson.*

Solicitors for the defendant John L. Bagge: *Montgomery & Chaytor.*

Solicitor for the defendant William D. Bagge: *W. J. Keery.*

T. C. T.

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(1) 18 Ves. 463.

RUDD *v.* REA.

(1920. No. 537.)

Powell J.
1921.
Jan. 12, 20, 21, 26, 27, 28.
Feb. 2, 3, 4, 9, 10, 23, 24, 25.
April 19.

Reservation—Growing timber—"Use of all roads and passes" for removal of timber—Licence to erect saw-mill—Implied rights—Construction of railway—Making gaps in fences—Manufacture of sleepers, etc.—Auctions on the lands—Time for removal of timber.

Under a contract for the sale by the owner of land of the timber growing on it, with "the use of all roads and passes," and permission to erect saw-mills on the lands, the purchaser was *held* not entitled (*a*) to use a saw-mill erected by him on the lands for the purpose of manufacturing sleepers or brush-heads out of portion of the timber; (*b*) to remove the timber by a mode of traction which so injured the roads through the land as to render them incapable of use by the owner of the land; (*c*) to hold sales of the timber by public auction on the land; (*d*) to leave timber or branches on the land longer than was reasonably necessary. The purchaser under such a contract *held* entitled (*a*) to lay down and work a railway on the land for the purpose of removing the timber; (*b*) to make gaps in walls and fences for the purpose of removing the timber, subject to the duty of restoring the walls and fences.

Action.

The plaintiff was the owner in fee of the mansion and demesne of Oriel Temple, County Louth, under a conveyance dated 10th January, 1920, excepting and reserving unto the assignees of James Lyons all timber growing on the said lands. The said James Lyons was a predecessor in title of the plaintiff, who by agreement in writing dated 18th September, 1919, sold to the defendant all the growing timber in the said demesne, and agreed to allow a period of five years from the date of the agreement for the removal of the said timber, "and the use of all roads and passes." James Lyons also gave verbal permission to the defendant to erect two saw-mills in the demesne to facilitate him in carrying out the contract; there was no other term in the contract with regard to the cutting or removal of the timber. The defendant proceeded to cut and remove the timber, which was estimated to weigh about 10,000 tons. In the course of his operations he erected a saw-mill and worked it for the purpose of manufacturing sleepers, brush-heads, &c., out of portion of the timber, and piled logs and manufactured goods on the avenue adjoining the mill; he partly erected a second mill, and for that purpose cleared an acre of shrubs; he constructed 600 yards of railway and hauled timber thereon; he used traction engines, motor lorries, and a caterpillar tractor on the avenues, passes, and roads of the demesne, which were not constructed for such traffic, and thereby did serious and permanent injury to them, and rendered them incapable of being used by the plaintiff for the ordinary purposes of his residence and farm; he left felled trees and branches on the lands and avenues, and thereby interfered with the plaintiff's use of the lands; he made gaps in fences for the purpose of removing the timber; and having taken timber through the gates, he failed to close them; he held public auctions on the lands for the sale of wood cut there. The action was brought for an injunction restraining the defendant from doing or continuing the acts above mentioned, and for damages for trespass and for nuisance.

Jellett K.C., *Wood K.C.*, and *Geoghegan*, for the plaintiff:—

The defendant must be taken to have known the position and the nature of the roads and passes of the demesne, and of the timber. The defendant could have removed the timber by horses and carts over the roads and passes; and in the absence of any express agreement, that must be taken to have been the mode of removal contemplated by the parties; the right to use traction engines, &c., is not necessary to the enjoyment of the right granted to use the roads, and it will not be implied: *Chichester Corporation* v. *Foster* (1); *Gas, Light, and Coke Co., Ltd.*, v. *Vestry of St. Mary Abbot's, Kensington* (2). The right claimed by the defendant to destroy roads and make gaps in walls and fences is a right to annihilate the plaintiff's rights of property, and this will not be implied: *Hext* v. *Gill* (3); *Love* v. *Bell* (4); *Butterknowle Colliery Co.* v. *Bishop Auckland Industrial Cooperative Co.* (5). The licence (if any) given to erect saw-mills on the lands did not authorize the use of such mills for any manufacturing purpose. The defendant had no right to make gaps in walls and fences in order to remove timber in the way most convenient to him: *Fritz* v. *Hobson* (1). The plaintiff is entitled to an injunction and to damages: *Shelfer* v. *City of London Electric Lighting Co.* (2). They also referred to *Wimbledon and Putney Commons Conservators* v. *Dixon* (3); *Attorney-General* v. *Brighton and Hove Co-operative Supply Association* (4); *Attorney-General* v. *Scott* (5); *Weston-super-Mare Urban District Council* v. *Butt* (6).

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(1) [1906] 1 K. B. 167.
(2) 15 Q. B. D. 1.
(3) L. R. 7 Ch. 699.
(4) 9 A. C. 286.
(5) [1906] A. C. 305.

S. L. Brown K.C., *H. Wilson K.C.*, and *J. H. Robb*, for the defendant:—

The defendant has not exceeded the rights given him by his contract. The means he has used to get out his timber are the ordinary and reasonable means to get out timber of this weight. The use of them is implied in the contract. Cuicunque aliquis quid concedit concedere videtur et id sine quo res ipsa esse non potuit: whoever grants a thing is supposed also tacitly to grant that without which the grant itself would be of no effect: *Liford's Case* (7); *Dand* v. *Kingscote* (8); *Hewitt* v. *Isham* (9). The principle that a man must not derogate from his own grant applies. The defendant bought this standing timber, and apart from the express grant of the use of roads and passes, got an implied grant of liberty to use all reasonable means of removing it. The means he used were ordinary; the reasonableness of their user is to be judged by the state of scientific progress at the date of user: *Hewitt* v. *Isham* (9), and must be taken to have been in the contemplation of the parties in entering into the contract: *Myers* v. *Catterson* (10); *Lyttleton Times Co.* v. *Warners, Ltd.* (11). Nowadays every timber merchant cutting standing timber uses a saw-mill and tractors and a railway. *Antrim* v. *Dobbs* (12) is a direct authority for the use of a tramway. As to the claim for damage to the avenues, the defendant using only reasonable means of getting out his timber is in the same position as a man having a right of way over another's avenue, and is under no liability to repair: *Jones* v. *Pritchard* (1). As to auctions, no damage was done, and the defendant contemplates no further auctions. Gaps in the fences must have been in contemplation of the parties. Timber was growing in the fences, and also inside the fences where there are no roads or passes, and had to be got out. Even if the defendant was under a liability to make good the gaps, the question will only arise at the end of the contract.

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(1) 14 Ch. D. 542.
(2) [1895] 1 Ch. 287.
(3) 1 Ch. D. 362.
(4) [1900] 1 Ch. 276.
(5) [1905] 2 K. B. 160.
(6) [1919] 1 Ch. 11; [1919] 2 Ch. 1.
(7) 11 Rep. 52*a*.
(8) 6 M. & W. 174.
(9) 7 Ex. 77.
(10) 43 C. D., at p. 481.
(11) [1907] A. C. 476.
(12) 30 L. R. I. 425.

[They also cited *Lewis* v. *G. W. Rly. Coy.* (2); *Ingham* v. *Mackey* (3); *Bidder* v. *N. Staffs. Rly. Coy.* (4).]

POWELL J., having reviewed the evidence, proceeded:—

Apart from rights or privileges which may have been conferred upon the defendant by express parol licence, or by the existence of terms to be implied by reason of custom or usage, what is the nature of the agreement of the 18th September, 1919? There is very little difference between my view and the general view put forward by the defendant's counsel as respects this matter. The agreement confers a right on the defendant to enter upon the lands of the plaintiff, and to do all things in the exercise of a right of a profit à prendre, which, having regard to all the circumstances, are reasonably necessary for the cutting and removal of growing timber from the locus in quo, to which I add, adopting the language of Mellish L.J. in the case of *Hext* v. *Gill* (5), "giving to the defendant every reasonable profit out of the growing timber"; and, of course, I quite accept the application of the well-known principle that where there is a grant of a profit à prendre, such ancillary rights as are reasonably necessary to its exercise or enjoyment are also granted. Lord Coke supplies authority for this in his report of *Liford's Case* (6):—"If I grant you my trees in my property, you may come with carts over my land to carry the wood. Lex est cuicunque aliquis quid concedit concedere videtur et id sine quo res ipsa esse non potuit." And this, Lord Coke says, is a maxim in law. I must, in regard to this instrument and the rights of the parties, follow and adopt the rule laid down by Lord Justice Bowen in *Myers* v. *Catterson* (1). I think the same learned Judge in a very few words in his judgment in "*The Moorcock*" (2) lays down the extent and limits of that which must be borne in mind in arriving at a conclusion as to what are proper and necessary implications in an instrument of this kind. "What the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended, at all events, by both parties, who are business men." I must also have regard to the principle laid down by Lord Loreburn in the *Lyttleton Times Co.* v. *Warners, Ltd.* (3), where he says: "When it is a question of what shall be implied from the contract, it is proper to ascertain what in fact was the purpose, or what were the purposes to which both intended the lands to be put, and having found that, both should be held to all that was implied in this common intention"; and I read that passage in connexion with the words of Lord Justice Bowen to which I have just referred.

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(1) [1908] 1 Ch. 630, at pp. 635, 637.

(2) 3 Q. B. D. 195.

(3) [1898] 1 I. R. 272.

(4) 4 Q. B. D. 412.

(5) L. R. 7 Ch. 699.

(6) 11 Rep. 51*b*.

Mr. Justice Parker, as he then was, in referring to *Lyttleton Times Co.* v. *Warners* (4), in his judgment in *Jones* v. *Pritchard* (5), says that "the case seems to show that if a grantor is doing on land retained by him only what it was at the time of the grant in the contemplation of the parties that he should do, and is guilty of no negligence or want of reasonable care or precaution, he cannot be liable for the nuisance entailed upon the grantee; and, of course, where the grantee is occasioning a nuisance to the grantor by doing on the land granted what it was at the time of the grant in the contemplation of the parties that he should do, and there is no want of care and precaution, the case is an a fortiori one." And in so applying the principle in question in the present case, I must have regard to all the surrounding circumstances in respect of what counsel for the defendant truly describes as a most unusual contract.

(1) 43 Ch. D. 470.
(2) 14 P. D., at p. 68.
(3) [1907] A. C., at p. 481.
(4) [1907] A. C. 476.
(5) [1908] 1 Ch., at p. 636.

Giving full weight to these considerations, I am unable to accede to the contention of defendant's counsel, that the legal effect of this instrument, either as regards what appears on the face of it or in relation to all proper and necessary implications, is or may be that the defendant is entitled to exercise his rights under it to the extent of annihilating the plaintiff's rights for the term of the contract. If that contention is right, it appears to me that the plaintiff has no case. There is certainly nothing on the face of the instrument that confers on the defendant the right to ignore the plaintiff's rights. Is it a reasonable and necessary implication that such rights are to be ignored? Apart from authorities laying down general principles, I am told that I am coerced to so hold by authorities applicable to the present case; but let me examine the principal authorities relied on.

The first of these cited by counsel for the defendant is *Earl of Antrim* v. *Dobbs* (1). The predecessor of the plaintiff in that case made a fee-farm grant of certain lands, excepting to the grantor "all mines and minerals and the right to him, his servants, horses, and carriages to enter, dig, bore, search for, and carry away the same, he and they paying reasonable compensation for any injury done to the lands in the exercise of these rights." At the time of the doing of the acts complained of, the defendant held portion of the grantee's interest under this grant. By lease the plaintiff demised the excepted mines and mining rights to an iron ore company, who, for the purpose of carrying away ore, laid down about six miles of railway with the rails in question, which passed through the defendant's lands, then through another portion of the lands comprised in the fee farm grant held by a third party, and finally through lands the property of and occupied by Lord Antrim, to a pier. The railway was worked by locomotive engines. There were other questions involved; but the question which is relevant here was whether the words of the reservation could extend to laying down a railway or tramway over the surface of the lands of the defendant, who derived under the grant. The case was tried before Lord Justice FitzGibbon and a jury, and amongst other questions left by the learned Judge to the jury was the following:—"Was the railway, as it was constructed and worked, reasonably necessary for working the mines under the lands granted by the deed and carrying away the ore therefrom?" and the jury found that it was. The question for the determination of the Divisional Court was really whether that finding could stand. The Divisional Court consisted of O'Brien and Holmes JJ.; and I think that the judgment of Holmes J. gives one a clear conception of what it was that the Court decided, and also the reasons for the decision. Referring to the words of the reservation, Holmes J. said (1): "When mines are excepted in a grant and there is a reservation giving a right to work them and to carry away their products, it is impossible to decide as a pure question of law whether a particular act done or work constructed is or is not covered by the reservation. The object of the reservation is to enable the owner of the mines to work them in the usual way and with reasonable profit, and the requisites for this purpose vary with the circumstances of the time and the locality. *Dand* v. *Kingscote* (2) and *M'Donnell* v. *Kenneth* (3) are authorities that a reservation of this kind is not to be confined to a right to employ such appliances as were in use or in contemplation at the date of the deed. They are also authorities, if authority be needed, against the proposition relied on by counsel for the defendant that the reservation does not confer a right to do 'anything' that would exclude the owner of the land from the enjoyment of the surface. I cannot conceive any method, even the most primitive, by which minerals can be extracted from the earth and carried away from the lands out of which they have been raised that would not for the time being exclude the surface owner from some portion of his property, and the object of the compensation clause that follows the reservation is to make good the loss that must thus arise. It seems to me that the true and only test to be applied to any work for the purpose of ascertaining whether it is covered by the reservation is whether, having regard to all the circumstances, it is reasonably necessary for working the mines and carrying away the ore."

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(1) 30 L. R. Ir. 424.

Adopting the analogy between the present case and the case of an owner of the soil and the owner of mining rights, and

(1) 30 L. R. I., at p. 432. (2) 6 M. & W. 174. (3) 1 I. C. L. R. 113.

giving the same effect to the rights conferred under the instrument here as was given to the reservation in that case, I am prepared, of course, to follow this decision in the present case to its logical conclusion. I agree that where there is an instrument giving a right to cut growing timber, and to carry the growing timber away, it is impossible to decide as a pure question of law whether a particular act done or work constructed is or is not covered by the reservation. I think that depends on a great many considerations. I agree that the object of the licence is to enable the purchaser of the timber to cut and remove it in the usual way, and with reasonable profit, and that the requisites for this purpose vary with the circumstances of the time and of the locality, and that a licence of this kind is not to be confined to a right to employ such appliances as were in use or in contemplation at the date of the deed. I agree that there are authorities, if authority be needed, against the proposition that the licence does not confer a right to do anything that would exclude the owner of the land to some extent at any rate from the enjoyment of the surface, and I cannot conceive any method by which timber could be cut and carried away from the lands out of which it has grown that would not for the time exclude the owner from some portion of his property, even although in this case, unlike *Earl of Antrim* v. *Dobbs* (1), there is no compensation clause following the licence that the defendant was to make good the loss that must thus arise.

Dand v. *Kingscote* (2) has been much relied upon by counsel for the defendant. In that case Baron Parke in his judgment says: "As the coals in all the seams are excepted, and a right to dig pits for getting those coals is reserved, all things that are depending on that right and necessary for obtaining it are reserved also according to the rule in Shepard's Touchstone, page 100; consequently the coal owner had, as incident to the liberty to dig pits, the right to fix such machinery as would be necessary to drain the mines and draw the coal from the pits. The case finds that the steam engine which was erected was necessary for the winning and working of the lower seams, which are the powerful seams in that coal-field, and therefore the defendant had the right to erect it"; and he held that compensation was due for the injury to the soil by making these adjuncts to the pit.

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(1) 30 L. R. Ir. 424.

(2) 6 M. & W. 174.

If the defendant here has a right to erect saw-mills, as to which I shall say something later on, then he certainly has the right to fix such machinery as would be necessary for the purpose of making it effective, even although in this case there is not, as there was in *Dand* v. *Kingscote* (1), compensation payable for the injury to the soil by erecting the accessories to the saw-mill.

The question of the railways in this case of *Dand* v. *Kingscote* (1) turned a good deal on a point of pleading, as will be seen by the judgment of Baron Parke at page 198; but, speaking of the reservation of way-leave, he said that there was no doubt that the object of the reservation was to enable the defendant to get the coals beneficially, and that therefore there passed a right to such description of way-leave, and in such a direction as would be reasonably sufficient to enable the coal-owner to get from time to time all the seams of coal with reasonable profit, and that therefore the owner was not confined to such description of way as was in use at the time of the grant, and in such a direction as was then convenient. Nothing that I shall decide in this case will, I think, be in contravention of that principle.

The next case relied upon was *Hewitt* v. *Isham* (2). The plaintiff in that case was tenant to the defendant under a parole demise which contained the following stipulation:—"All the hedges, trees, thorn bushes, fences, with the top and lop, are reserved to the landlord." The action was for trespass for that the defendant's workmen entered upon the farm in question, and, having cut down some trees, dug saw-pits on the lands for the purpose of sawing the timber. The defendant pleaded, inter alia, leave and licence, and gave some evidence of the acts having been done by the plaintiff's permission, but relied principally upon the stipulation in the demise. This evidence was objected to by plaintiff's counsel, but received by the Judge at the trial, who directed the jury that the stipulation in the lease afforded evidence of leave and licence, and the jury found a verdict for the defendant. Counsel for the plaintiff moved to set aside the

(1) 6 M. & W. 174.

(2) 7 Ex. 77.

verdict and for a new trial, on the ground of the improper reception of evidence, and also for misdirection, and contended that the stipulation in the demise was not evidence of leave and licence, but amounted to a reservation, and should have been so pleaded. In the Divisional Court no rule was made. Pollock C.B. said:—"The demise not being by deed, the stipulation in question cannot operate as a grant, but the law will construe it in some way so as to effectuate the intention of the parties. Had it been by deed, the law would have construed it as a grant, and have implied a right to go upon the lands for the purpose of cutting and carrying away the trees. But as the reservation is by parole, it will only operate as a licence to the same extent as if it had been a grant."

Baron Parke said that the stipulation could not operate as a grant or easement, because it was not under seal; it could only operate as a licence. He then refers to a passage in the report in *Liford's Case* (1), in which it was resolved that when the lessor excepted the trees, and afterwards had an intention to sell them, the law gave him, and them who would buy, a power as incident to the exception to enter and show the trees to those who would have them, for without sight none would buy, and without entering they could not see them. So that, he says, according to the authority of that case, "wherever trees are excepted from a demise, there is, by implication, a right in the landlord to enter the lands and cut the trees at all reasonable times. If, indeed, he leaves them on the land for an unreasonable time, he does more than the law authorizes him to do." This decision, I think, in one branch of it, supports the argument that the instrument here, although not capable of operating as a grant of an easement, will operate as a licence to the same extent as if it had been a grant, and therefore affords evidence of such leave and licence as may properly be implied. But all that was decided in the case was that the direction of the Judge to the jury that the stipulation afforded evidence of leave and licence was right. It was still a question for the jury whether what was done was proper and reasonable having regard to the implication. The fact that Baron Parke says that the law would not authorize the defendant to leave the trees on the lands for an unreasonable time clearly shows that there are acts which might be done by the defendant which would not be covered by the leave and licence.

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(1) 11 Rep. 52*a*.

But I do not understand the decisions in these cases, or any of them, to lay down the principle as a matter of law that the owner of the soil has no rights, or that the licensee was entitled to ignore the owner's rights altogether, or that the licensee was entitled to annihilate the rights of the owner, or that a right was conferred on the licensee to inflict not only what Mellish L.J. in *Hext* v. *Gill* (1) describes as "temporary damage," but in addition damage which would result in the annihilation of the plaintiff's rights, and destroy the property of the plaintiff, depriving him of access to his house and the use of his farm roads, and causing "serious, continuous, and permanent injury to the surface." If the decisions go as far as that—and I do not think they do—then I think they would ignore the well-known principle expressed in the maxim, sic utere tuo ut alienum non laedas; and, still following the analogy between the present case and the case of the respective rights of the owner of the soil and the owner of mineral rights, they could not, I think, be reconciled with the decisions in *Love* v. *Bell* (2), *Hext* v. *Gill* (1), or *Butterknowle Colliery Co.* v. *Bishop Auckland Industrial Co-Operative Co.* (3.), two of them decisions of the House of Lords, and one of them of the Court of Appeal in England. No doubt these cases deal with injuries caused to the owner of the soil by depriving him of the right of support, but the right of support is only one of the natural rights of the owner of the surface as an incident of property. It is a right which enables him to prevent the destruction of his property. Lord Macnaghten points out in *West Leigh Colliery Co.* v. *Tunnicliffe & Hampton, Ltd.* (4), that it is not a right in the nature of an easement, but merely the right of a landowner to the ordinary enjoyment of his land.

The surface-owner has at Common Law a right to have the surface supported by the subjacent land. It is not reasonable to suppose that the surface-owner intends to give up a right so

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(1) L. R. 7 Ch. 699.
(2) 9 A. C. 286.
(3) [1906] A. C. 305.
(4) [1908] A. C. 27.

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important for the user of the surface without adequate consideration, and the Courts do not easily come to the conclusion that it is the intention of a contract to give up this right to support; and therefore, in construing a contract intended to determine the relative rights of the surface-owner and the owner of the subjacent land, it is fitting to take into consideration, not only the words of the contract, but the nature of the right which it is sought to say the contract intends that the surface-owner was surrendering.

I think that it is equally true to say that the owner of lands has at Common Law a right to prevent a person exercising the right of cutting and removing timber from doing it in such a way as to destroy lands of the owner or to annihilate his right.

Love v. *Bell* (1), like *Antrim* v. *Dobbs* (2), was a case relating to the right to take minerals, and a conflict between the concurrent rights of a person so entitled and the rights of the owner of the soil. The section in the Inclosure Act (3), upon which the case turned, empowered the lords of the manor and their successors as owners of the royalties to hold and enjoy, inter alia, the power of using or granting way-leave and all other royalties and jurisdictions whatsoever in as full, ample, and beneficial a manner to all intents and purposes as they could or might have held and enjoyed the same in case the Act had not been made. There was a proviso for compensation for damage and spoil of ground. A commoner brought an action for damages for injury to the surface of his land by subsidence; and the House of Lords held that there was nothing in the Act giving the lords the right to let down the surface. Lord Selborne referred to the opinion given by Lord Blackburn in *Davis* v. *Treharne* (4), in which that learned Lord had said:—"I think it must be taken as perfectly settled ground that as of common right the surface land has the right to be supported by subjacent strata of minerals. Although that is the common right, it may be shown—the burden lying on those who wish to show it—that the person who has got the surface obtained it either upon terms which would give him no right of support, he having accepted it and taken it upon those terms, or that before he got it the person through whom he claims as owner of the surface had parted with the right to support from below, in which case, of course, the owner of the surface could be in no better position than the person who sold it to him." Lord Selborne says in *Love* v. *Bell* (1) that whoever claims against that has the burden of proof thrown upon him. At page 291 he says: "Supposing in the clause of reservation these words had been expressly inserted, 'reserving the mines and minerals, with all the usual powers and surface privileges for working them,' would that have given the right to let down the surface? Would that have destroyed the freeholder's right? I apprehend that it clearly would not." Later on he says: "The only ground for saying that they might lawfully from time to time have let down portions, and, perhaps, ultimately the whole of the surface is this: that they might have done so without injuring the surface rights of the commoners. They would not then have infringed the principle, 'sic utere tuo ut alienum non laedas.' No damnum, no injury, would have been suffered by the commoners, and therefore the lords might have been subject to no action and no restraint. But now the commoners, giving up the whole of their common rights, take in lieu of them these allotments. Why should not the lord in his altered position as to the reserved rights be subject in respect of these allotments to the principle 'sic utere tuo ut alienum non laedas' in its full extent as much as he was before?" He then dealt with a proviso for compensation, and held that the proviso for such did not apply to damages for subsidence.

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(1) 9 A. C. 286.
(2) 30 L. R. Ir. 424.
(3) 11 Geo. 3, c. xcix.
(4) 6 A. C. 460.

I cannot see how the position of the defendant here under the instrument in question can be put any higher as regards the right to cut and carry away the timber than were the rights of the lords conferred on them by statute, giving them the power to hold and enjoy all mines, with power of using or granting way-leave, and all other royalties and jurisdictions whatsoever; and if the lords in that case were subject to the principle "sic utere tuo ut alienum non laedas," why should not the defendant here be subject to that principle to the extent of preventing him from exercising his rights in such a way as to annihilate the plaintiff's rights?

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(1) 9 A.C., at p. 291.

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In *Hext* v. *Gill* (1) Mellish L.J., at p. 714, says: "The question is whether the words of the reservation in the present case mean that the ownership of the surface is altogether to be subject to the ownership of the minerals, so that the owner of the minerals may do whatever is necessary for the purpose of enabling him to get them, although it may, of necessity, utterly destroy the surface; or do the words, according to their true construction, only give a right in the nature of an easement to go upon the surface and dig through it for the purpose of getting at the minerals underneath? In my opinion, the short and ambiguous words in this reservation, according to their fair construction, only give a right to create what I may call temporary damage, and do not authorize the owner of the minerals absolutely to destroy or to cause a serious, continuous, and permanent injury to the surface." James L.J. says, at p. 719: "The long and uniform series of authorities appear to me to have established a very convenient and consistent system, giving the mineral owner every reasonable profit out of the mineral treasures, and at the same time saving the landowner's practical enjoyment of his house, garden, fields, and woods, without which the grant to him would be illusory."

Now, when the defendant's counsel cited *Antrim* v. *Dobbs* (2), I was told that I must construe the instrument here in the same way as if it were a reservation in a grant. Be it so. Supposing that the owner of this demesne and land had granted it in fee to the plaintiff, reserving to himself the right to cut the timber, and reserving the use of the avenues and passes for that purpose, could the owner of the rights under the reservation successfully claim the right to destroy the surface of the land so granted? I think not. Giving himself, as owner of the timber, every reasonable profit of the timber, would he not be bound to save the landowner's practical enjoyment of his house, garden, and fields, without which the grant to him would be illusory? I cannot see why he should not be bound to do so. At p. 718 of his judgment in *Hext* v. *Gill* (1) Mellish L.J. says: "When an owner of both surface and minerals sells the surface and reserves the minerals, with power to get them, he ought, if he intends to have the power of destroying the surface in getting them, to frame his power in such language that the Court may be able to say that such was clearly the intention of the parties."

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(1) L. R. 7 Ch. 699.

(2) 30 L. R. Ir. 424.

Again, on this question of concurrent rights, could the defendant here lawfully prevent the plaintiff from using the avenues and farm roads for his own proper purposes, even although such use to a certain extent might cause an obstruction or hindrance to the defendant in the removal of the felled timber?

In *Gearns* v. *Baker* (1) the Court of Appeal held that a landowner, who had demised for a term of years the right of shooting over his lands, was not thereby prevented from cutting timber as he thought fit in the ordinary management of his land, although it was shown to be injurious to the shooting. Lord Justice James, referring to the contention that the right of shooting conferred on the owner of it the right to interfere with the owner of the lands in his mode of managing his own property, says: "If men mean to acquire such rights, they must express their meaning clearly." If the defendant here has no legal right to prevent the plaintiff from using his avenues or farm roads for his own purposes, can he do so by rendering them useless by any methods which he chooses to adopt, which he decides to be reasonable from his own point of view?

In *Hext* v. *Gill* (2) the ownership of the minerals was separate from the ownership of the surface. The right to get a particular class of mineral was held to have been conferred by the reservation, and yet the owner of the mineral right was held not to be entitled to get that particular class of mineral, because he could not get it without destroying the surface, or doing it serious, continuous, and permanent injury. Here the plaintiff is the owner of the soil itself upon which the trees stand. Can his rights be annihilated? Can his property be destroyed, or serious, continuous, and permanent injury done to it in pursuance of any rights reasonably to be implied from the instrument here? In *Butterknowle Colliery Co.* v. *Bishop Auckland Industrial Co-operative Co.* (3) a clause in an Inclosure Act gave the lords of a manor all convenient and necessary ways and way-leaves and liberty of

(1) L. R. 10 Ch. 355.

(2) L. R. 7. Ch. 699.

(3) [1906] A. C. 305.

laying and repairing waggon ways and other ways in, over, and along the same or any part thereof, and of searching for, winning, and working the mines and quarries, and other usual liberties." Mr. Justice Farwell decided that the Act did not take away from the surface owners their common law right to support, and that the plaintiffs were entitled to an injunction. Lord Justice Vaughan Williams, in his judgment in the Court of Appeal, says, at page 437: "With regard to the present case, I will look first at the powers granted or reserved—I cannot think myself that on the present question of construction it matters much which—to the mineral owner. I do not think that the words of the power taken by themselves extend to letting down the surface. I think that the powers reserved or granted are reserved or granted subject to the obligation which existed before the statutory contract came into operation, and continued after it came into operation, sic utere tuo ut alienum non laedas." Lord Loreburn, the same learned Lord whose judgment in *Lyttleton Times Co.* v. *Warners* (1) is relied on by the defendant's counsel, says: "Words, however wide, that merely authorize the getting of all the minerals have been held not to authorize so getting them as to let down the surface." He then deals with the question of compensation, and speaks of the circumstances which supply Judges with the reason for cutting down wide language in a grant of minerals so as to imply the condition that the surface shall be supported; and he says that the process of reasoning in such cases seems to be that the parties must not be supposed to have intended what would be unreasonable and unjust. I think that in each of them, he says, a clause providing for the continuance of support would not have been inconsistent with the actual clauses. He then refers to the case of *Love* v. *Bell* (2).

Lord Macnaghten, in speaking of the right to support, says that the presumption in favour of one of the ordinary and most necessary rights of property holds good whether the instrument of severance is a lease, or a deed of grant, or a reservation, or an Inclosure Act, or an award. To exclude the presumption it is not enough that mining rights have been reserved or granted in the largest terms imaginable, or that powers and privileges usually

(1) [1907] A. C. 476.

(2) 9 A. C. 286.

found in mining grants are conferred without stint, or that compensation is provided in measure adequate, or more than adequate, to cover any damage likely to be occasioned by the exercise of these powers or privileges. Lord Macnaghten there speaks of one of the ordinary and most necessary rights of property· Surely no right of property is more ordinary or necessary than the right of an owner to have access to his house, his fields, and to the use of his roads for the purpose of his farming operations? Let me apply the reasoning in Lord Loreburn's judgment, as it seems to me it ought to be applied in the present case :—(*a*) that the parties must not be supposed to have intended what was unreasonable and unjust. That, he says, is the principle which supplies Judges with the reason for "cutting down" wide language in a grant of minerals; (*b*) that a clause that the plaintiff's property should not be destroyed would not have been inconsistent with the instrument here. The defendant here is a timber merchant of great experience; presumably he inspected the demesne before he entered into the contract; he saw the avenues, passes, and farm roads; he bargained for a period of five years for the removal of the timber, and for the use of the avenues and passes. Did he imagine for one moment that he was requiring the owner to confer on him the right to destroy them, to render them useless to the owner for the purposes of his mansion-house and for the working of his farm? Did the owner intend to confer such a right on the defendant?

I think the answer to both these questions is "No." Would a clause in this instrument providing that, in carrying out his operations by whatever methods he chose to adopt, the defendant should not destroy the avenues, farm roads, or fences of the owner of the property, or render them incapable of being used by the owner of the property, be inconsistent with the instrument? I think not. In my opinion it is impossible to hold that the instrument here conferred a right on the defendant to annihilate the plaintiff's rights. Plaintiff's rights might be capable of being annihilated if the defendant had so stipulated, and the stipulation had been included in the instrument, but I cannot hold that there is any such implied right in the contract here. I am not for a moment saying that the contract here does not by necessary implication confer rights on the defendant which will to a certain extent deprive the plaintiff of the full enjoyment of his property, and inflict considerable damage upon him. I think it does, and the decision which I am about to make in regard to several of the matters complained of will show that I so think. But I am not prepared to assent to the proposition that the plaintiff has no rights as owner of the soil, because if the defendant by reason of being the sole judge of the reasonableness of what he does can annihilate the rights of the plaintiff, then for all practical purposes the plaintiff has no rights.

I therefore do not think that the decisions relied upon by plaintiff, or any of them, justify in point of law all the acts alleged by the plaintiff to be wrongful acts done by the defendant, and sought to be justified on an implication of leave and licence.

I have thus far dealt with the questions of law which seem to me to require to be considered before one approaches the consideration of the evidence. Other questions of law will have to be determined as the consideration of the evidence proceeds. As regards the correspondence, it is in evidence, and, of course, can be referred to by the Court above, but I do not think that it can affect the issues which I have to determine. I now come to deal with the matters complained of in the statement of claim, the evidence on behalf of the plaintiff in support of them, and the evidence on the part of the defendant in answer to them. It is, I think, unnecessary, and it would be manifestly inconvenient, that I should review the entire of the evidence in minute detail.

As regards the erection and working of the saw-mills, I have come to the conclusion and find as a fact on the evidence that saw-mill No. 1 was erected and saw-mill No. 2 partly erected by the express leave and licence of Mr. Lyons. I am not aware that any complaint was made as to the mode of erection of saw-mill No. 1, and in any case as the defendant, in my opinion, had express permission to erect it, it follows, I think, as Baron Parke decided in *Dand* v. *Kingscote* (1), that, having the right to erect a saw-mill, as the defendant in *Dand* v. *Kingscote* (1) had the right to sink pits, the right to fix such machinery as would be necessary to work the saw-mill was included in the permission. I am

(1) 6 M. & W. 174.

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satisfied that the engine, saw-benches, etc., are not fixtures. It is alleged in the statement of claim that saw-mill No. 1 was worked for the purpose of manufacturing sleepers, brush-heads, etc., and that logs of timber and manufactured goods were piled on the avenue adjoining the mill for the purpose of such manufacture.

In my opinion, this particular use of a saw-mill is not authorized by the express permission relied on, which, in my view, was given by way of facilitating the removal of the timber; and even if by the alleged implied terms of the contract a saw-mill or saw-mills might be erected as part of the plant, as stated by one witness, I do not think that it could be maintained for the purpose of manufacturing timber into sleepers, scantlings, or brush-heads. I think this use would add a considerable burden to the lands of the plaintiff, involving the continuous piling of partially cut timber on the lands, and considerable additional traffic through the gate and avenue of the plaintiff at that place; and I do not think that the defendant is entitled to leave for a considerable length of time timber piled upon the plaintiff's land. Baron Parke expressed the same view in *Hewitt* v. *Isham* (1).

As regards saw-mill No. 2 and the matters complained of in connexion with it, the erection of this saw-mill was never completed, but the plaintiff in his evidence says that the defendant apparently, in contemplation of erecting it, dug a deep trench round the site; he says that there was and is on the site a channel between the site and the lake shown on the plaintiff's map to carry the overflow of the lake to the stream; that the result of the clearing operations was that trees were pulled across the stream, with the result that the water flowed over and injured a considerable area of plaintiff's lands, and he says the defendant broke a gap as an exit from the intended saw-mill 20 feet wide, and has left that gap open to the present time, with the result that cattle can get through it from the road into the plantation; and he gave a specific instance of damage caused to an animal of his, attributable, as he alleges, to this act. I think that for that purpose (following the reasoning applicable to the erection of saw-mill No. 1), in the course of the erection of saw-mill No. 2, the defendant would be justified in clearing

(1) 7 Ex. 77.

a reasonable site for the saw-mill, even though it caused an injury to the plaintiff by the destruction of rhododendrons, etc., in reasonably making a trench for the purpose of draining the land upon which the saw-mill stood, and in making a reasonable exit to the public road from the saw-mill. I think the right to do this would follow from the express permission, but I do not think that he was entitled to clear an acre and a half, thus depriving the plaintiff of a considerable quantity of land; nor was he entitled, in my opinion, to level the fence to the extent of 20 feet for the purpose of making an exit; nor, in my opinion, was he entitled to leave an exit of that description unprotected and unfenced.

As regards the construction and working of the railway, I am of opinion, having regard to the nature and extent of this contract, that the erection of the railway for the removal of the timber, although, as in *Antrim* v. *Dobbs* (1), it does exclude the owner from some portion of his property, is a reasonable exercise of the defendant's rights under the contract. The plaintiff in his evidence said that to erect this railway the defendant cleared an area of five to seven yards in breadth of shrubs, small trees, and underwood. He said in cross-examination that he complained of its position, because it destroyed shrubs. I am not satisfied that it has been proved that the construction of the railway which has been laid down was done unreasonably in the sense of having been done recklessly or wantonly. I think it was unavoidable that its construction should result in the destruction of considerable quantities of shrubs and underwood on its site, but I think the plaintiff must bear that loss; nor am I prepared to hold that the plaintiff has a right to select the site of the railway.

It follows, I think, from the views which I have expressed as to the use of saw-mill No. 1, that timber should not be conveyed by the railway in question to the saw-mills for manufacturing purposes; but if I am right in the conclusion that the saw-mill itself should not be used for that purpose, and effect is given to that decision, there will be no necessity, I apprehend, to give any relief under the head at present under review. I do not propose to make any order as regards the railway or its working.

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(1) 30 L. R. Ir. 424.

As regards the damage done to the roads and drains by the traction engine, steam lorries, and caterpillar tractor, I am satisfied on the evidence that serious, continuous, and permanent injury has been done to these avenues and this road thereby, and damage not only to their surface, but to their foundation; that, to use the expressive phrase of one of the plaintiff's witnesses, "some of them are burst up, and some of them for all practical purposes destroyed." In the view I take of this case, I think this is a very important matter, because it appears to me that if the contention of defendant's counsel is right, the plaintiff may sustain very serious injury without any redress. There are several avenues or ways which have been used by the defendant in carrying out this contract so far. I need not refer to them in detail.

The defendant is not concerned, I think, to deny that they are substantially injured. His case is that he is entitled to injure them—to destroy them so far as their utility for the plaintiff's purposes are concerned; to annihilate the plaintiff's rights in relation to them, not only for five years, but, logically, altogether; and for this reason he can, according to his counsel's contention, use them as long as they are usable for his own purposes, and in any manner he thinks fit, no matter what injury is done to them. That means that if and when he has reduced them, by a continuance of this particular traffic, to a ruinous condition, he is not bound to restore them to any reasonable condition of repair. He can, I suppose, use his railways and his caterpillar, when the avenues or farm roads are destroyed, and leave what were once avenues absolutely useless to the plaintiff. They would no longer be avenues or farm roads at all. The result, of course, would be that the plaintiff and his family would not have access to their house, or from the house to the public road, except by ploughing their way on foot through a morass; plaintiff's farming operations would come to an end unless and until he restored the avenues and roads to such a condition as would enable him to use them, and during the period of five years such repairs would or might be, as they have been up to the present, entirely useless. Counsel for the defendant put this right on two grounds. They say that, having regard to the legal effect of the agreement and to its implied terms, it is not the convenience of the vendor but of the purchaser that is to be consulted, that the purchaser is entitled to deprive the vendor of his property where absolutely necessary (that I take to mean absolutely necessary in the view of the purchaser); that the question is, what is reasonably necessary; that the reasonable necessity varies with the times and the progress of mechanical invention, including methods which add to the burden of the owner, and deprives him, at least temporarily, of the use and enjoyment of his property; and it is said that the authorities cited justify acts which may and do deprive the owner of the use and enjoyment of portion of his property; and, again, that as long as they, the avenues, are usable, the defendant can use them, and, I take it, use them in such a way as that they shall not be capable of being used by the plaintiff. It is said that this result is produced because both parties to the contract must be assumed to have known the condition of the avenues and the purposes for which they were to be used.

I do not think, as I have said, that any term to be reasonably implied extends to confer a right on the defendant to destroy the avenues; I do not think that it was the intention of the vendor that any such right should be conferred on the defendant. I think it would be much more reasonable to say that, as knowledge of the condition of the avenues is to be imputed to the defendant, there was an implied term in the contract that he was not to use them in a way which would destroy them. If he wished to acquire the right to destroy the avenues, he should have required an express stipulation authorizing him to do so, or required such an increased period of time for the carrying out of the contract as would have enabled him to do so by methods which would not involve their destruction. But be that as it may, I am of opinion that the injuries done to some of the avenues by the defendant are not justified by any term to be implied in the contract.

Then defendant's counsel say that there was what is equivalent to an express grant of an easement, a right of way over the avenues, and that as there is no obligation on one who has an easement of that kind to repair the way, the plaintiff has no remedy in respect of these injuries. In support of this contention, Mr. Wilson referred to *Jones* v. *Pritchard* (1). Mr. Justice Parker, at p. 638, refers to a statement made by Lord Mansfield in *Taylor* v. *Whitehead* (2), that by the Common Law of England he that hath the use of a thing ought to repair it. He says that though in his opinion Lord Mansfield was in that case referring only to the fact that by the Common Law the owner of the servient tenement is not under any liability for not repairing the subject of the easement, yet there is undoubtedly a class of cases in which the nature of the easement is such that the owner of the dominant tenement not only has the right to repair the subject of the easement, but may be liable to the owner of the servient tenement for damage due to any want of repair. He instances the case of an easement to take water in pipes across another man's land. He says that, strictly speaking, he does not think that even in this case the dominant owner can be said to be under any duty to repair. "I think," he says, "the true position is that he cannot under the circumstances mentioned plead the easement as justifying what would otherwise be a trespass, because the easement is not in fact being fairly or properly exercised." He said, however, he could not discover any case in which the principle had been applied unless the easement includes the laying on another man's land of some artificial work to be used for the purpose of and belonging to the dominant owner.

I cannot find that the attention of the learned Judge was called to the judgment of Lord Romilly in *Ingram* v. *Morecraft* (3); and, indeed, having regard to the nature of the easement which Mr. Justice Parker was considering in *Jones* v. *Pritchard* (1), it would, perhaps, not have been of any assistance. In the case to which I refer, Sir John Romilly says: "My impression is that where a right of way is granted, it is for the dominant tenant to do all that is necessary for making the right of way available. If I grant a man a right to lay pipes over my land, it follows that he must keep them water-tight, for otherwise the escape of water is a trespass. The same rule applies to a road, as the grantee cannot go to the side beyond the limits of the road when it is out of repair; he must make it good. I think it is the duty of the dominant tenant to do all that is necessary to make the road available for himself, and to protect the servient tenement from unnecessary injury."

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(1) [1908] 1 Ch. 630.
(2) 1 Wm. Saunders, 565.
(3) 33 Beav., at p. 49.

In the notes to the leading case of *Pomfret* v. *Recroft* (1) there is the following passage: "This principle is recognized in *Taylor* v. *Whitehead* (2), where it is held that a person who has a private way cannot justify going upon the adjoining land because the way was impassable. For by the Common Law he who has the use of a thing, as in this case the grantee of a way, ought to repair it."

Even supposing that this means only that if a person claiming under an express grant of a right of way requires to use the right in a particular way which will necessitate repairs for that use, he must himself do the necessary repairs; still it appears to me that the principle would apply in the present case, because the defendant here is claiming the right to use these avenues for a class of traffic for which it is quite clear on the evidence they were not constructed, and which in their condition at the time of the making of the agreement they were not fit to bear. It seems to me that the defendant here is claiming the right to use this easement of rights of way, if such they be, for his own purposes exclusively, and so as to exclude and prevent the plaintiff from using them for his purposes by rendering it impossible for the plaintiff to so use them. Mr. Justice Buller in *Rex* v. *Jolliffe* (3), speaking of a right of way, said: "This is not like the case of a grant of land, to be used in a manner incompatible with any other mode of enjoying it, for the defendant has only the liberty of passing over this for the purpose of carrying his coals, and cannot prevent any other person from using it; and if grass were to grow on this way, the owner of the land would have a right to feed his cattle on it; the easement which the defendant has does not affect the right of the owner of the land."

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(1) 1 Wm. Saunders, 557.
(2) 2 Doug. 745.
(3) 2 Term Reps. 95.

The plaintiff, too, has a right to the use of these avenues and farm roads. Has the defendant a right to destroy all this right by his user? According to his contention he can utilize the most recent appliances in the way of tractor and motor lorries and such like on the avenues, and railways and caterpillars elsewhere, in order to secure the benefits of his contract in the quickest possible time; but the owner is to be deprived of the use of a motor or a horse and trap to get to his house, and of horses and carts to work his farm; and I am asked to hold that this is a necessary implication arising on the construction of this agreement. Unless the instrument by which the right is granted shows an opposite intention, I am not sure that when a man grants the use of his avenues and farm roads to a timber merchant without more, there is not an implied intention that no alteration shall be made, and that the right is to be used by the timber merchant in the best way it can as things then exist. But I am dealing with this branch of the case on a hypothesis much more favourable to the defendant. Again, assuming that the defendant is within his rights in claiming a right of way by express grant over these avenues and passes, including the right to use tractors, lorries, and such like, for which class of traffic they were not constructed, and which class of traffic they are not really fit to bear; on that hypothesis, I take it, he has the right of making them effective for the purpose for which he requires them. This proposition is put thus in Goddard on Easements, 7th ed., p. 382: "If a person has an easement, he may enter the servient tenement and put the subject of the easement into a suitable condition for the exercise and full enjoyment of his right, even though it was not at the time of the grant, and has never been in that state before." In *Newcomen* v. *Coulson* (1) Jessel M.R. said:—"Now, it was conceded to be a principle of law that the grantee of a right of way has a right to enter upon the lands of the grantor over which the way extends for the purpose of making the grant effective; that is, to enable him to exercise the right granted to him. That includes not only keeping the road in repair, but the right of making a road. If you grant to me over a field a right

(1) 5 Ch. D. 143.

of carriage way to my house, I may enter upon your field and make over it a carriage way sufficient to support the ordinary traffic of a carriage way; otherwise the grant is of no use to me, because my carriage would sink up to the naves of the wheels in a week or two of wet weather. It cannot be contended that the word 'repair' in such a case is limited to making good the defects in the original soil by subsidence or washing away; it must include the right of making the road such that it can be used for the purpose for which it is granted." Malins V.-C. in the Court below was of the same opinion, and relied on the decisions in *Dand* v. *Kingscote* (1) as an authority. Here there is a way defined and granted according to defendant's contention, and he says he is entitled to subject it to this heavy traffic, and therefore, as it seems to me on that assumption, he is entitled to make good the defects in the original condition of the avenues, so that they can be used with the most modern appliances for the purpose for which he alleges they were granted; and if he can lawfully do so, is he not bound to do so? Can he use the right over the way to the extent of destroying the plaintiff's property, and at the same time neglect or refuse to avail himself of the power of doing that which will prevent the injury?

Then, it is said alternatively, that if there is not an express grant of a right of way there is an implied grant, and that by implication the defendant must be held to have been authorized to use these avenues in any way he thought fit for the removal of the timber. Why should I upon any reasonable view of the doctrine of implication hold that the person who made this grant anticipated that the defendant would, while neglecting or refusing to avail himself of the power to make these avenues fit for a kind of traffic which they were not constructed to bear, insist on using that kind of traffic upon them to the extent of depriving the owner and his successors in title of the use of them for his own and their legitimate purposes? How can I assume that the "business man" spoken of by Lord Bowen would intend any such result to be produced? If he did so intend, and if he knew that such was the effect of his agreement with the defendant, then it appears to me that it would be little short of a fraud on his part to foist upon the assignee his fee-simple interest in the mansion-house, demesne, and farm, presumably for a large sum of money, subject to a stipulation in favour of the defendant which would render the property, from the owner's point of view, practically valueless. Indeed, I gathered from the defendant's evidence, to which I have referred, that it was his intention to make the avenues fit for this kind of traffic, and that he would have carried it out but for some difficulty in getting the requisite amount of stones. But what he has in fact done is to use heavy motors, drawing heavy lorries, heavily laden with timber, continually over these avenues without making any provision for such a use of them until they have to a great extent been destroyed as avenues and rendered useless to the owner, who has certainly the right to use them for his own lawful purposes. I have not heard it suggested by the defendant's counsel that it is the duty of the plaintiff here to put these avenues in a condition to render them fit for this kind of traffic; and if the defendant refuses to put them in such a condition, claiming a right to destroy them, then it appears to me that in a very short time they will be useless for the purposes of the defendant also.

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(1) 6 M. & W. 174.

I am not going to decide, as a matter of law, in this case that the defendant is not entitled to use traction engines, motor lorries, and caterpillars, or such like vehicles, for the purpose of removing the timber over these avenues and farm roads; what I am deciding is that if he does use them, in so using them he is not entitled to destroy the plaintiff's avenues and farm roads, and to render them useless to the plaintiff for his legitimate purposes, or to reduce them to such a condition as to be dangerous to the plaintiff to use them for such purposes.

I do not think that the defendant can put his right of user of these avenues under the agreement here any higher than the right of the defendants in the case of the *Gaslight and Coke Co.* v. *The Vestry of St. Mary Abbots, Kensington* (1). In that case certain streets were vested in the defendants, the vestry of the parish, by certain statutes which gave them the authority of the Surveyor of Highways, and with a duty to repair, but without prescribing any particular mode of repair. They used steam

(1) 15 Q. B. D. 1.

rollers for the repair of the streets, as being the mode of repair most advantageous to both the ratepayers and the public; but the rollers they used were so heavy as to frequently injure the plaintiffs' pipes, though the pipes were sufficiently far below the surface not to have been injured by the ordinary mode of repair if such rollers had not been used. The argument of counsel for the defendants in that case was that the injury done to the plaintiffs, being the result of the defendants doing what was a lawful act and what they were entitled to do in performance of a statutory duty, the plaintiffs could have no cause of action for such injury. Lord Justice Lindley in his judgment said that the authorities show that an action lies for an injury to property unless such injury is expressly authorized by statute, or is, physically speaking, the necessary consequence of what is so authorized. If in this case, he says, the defendants were expressly authorized by statute to use steam rollers of such a weight as necessarily to injure the plaintiffs' pipes, the plaintiffs would have no ground of complaint. The case would then be one of damnum absque injuria. The same consequence would follow if the defendants were expressly authorized by statute to repair in some way which necessarily required the use of heavy steam rollers or other machinery which could not be worked without injuring the plaintiffs' pipes. Although such rollers or machinery were not expressly mentioned, their use would be authorized by necessary implication, and the plaintiffs would be without redress. But unless some such statutory enactment can be shown to authorize the defendants to injure the plaintiffs' pipes, the plaintiffs are entitled to redress. The ratio decidendi in that case was adopted by the Master of the Rolls and the Court of Appeal in the case of *The Alliance and Dublin Consumers' Gas Co.* v. *The Dublin County Council* (1). The plaintiffs had laid down pipes under the surface of certain roads, as they were entitled by statute to do, in order to supply gas for public and private purposes. The defendants were charged by statute with the duty of maintaining the roads in the county, and were for that purpose authorized to purchase or hire a steam roller. The defendants used steam rollers for the repair of the roads, but the rollers were so heavy as to frequently injure the plaintiffs' pipes, though they were laid at a depth sufficiently safe from injury by the ordinary traffic and the ordinary mode of repair if such rollers had not been used. It was held that the plaintiffs were entitled to an injunction to restrain the defendants from using steam rollers in such a way as to injure the pipes of the plaintiffs, then properly laid under the road, regard being had to what at the time of the laying of the pipes was the ordinary traffic and the reasonable means of repairing the road. Lord Justice FitzGibbon said: "As to the question of principle, the road authority has the right to maintain the roads under its charge by all reasonable means, having regard to what reasonable means are at the time and to the traffic to which the roads are ordinarily subject. It would be monstrous to hold that road contractors cannot advance with the times. They certainly are entitled, and even bound, in discharge of their duty to the public, to use modern contrivances to maintain the roads in the best and cheapest manner. But, on the other hand, the Gas Company are entitled to protection for what they have legally done in accordance with the conditions of the times when they laid their existing pipes, provided due and proper care and skill were then used in laying them."

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(1) [1901] 1 I. R. 492.

Now, I am satisfied that at the date of the commencement of the contract in the present case the avenues were constructed in such a way as to be reasonably fit for the purposes for which they were intended to be used by the owner of the mansion house. There is certainly no express authority in this agreement to use vehicles of such a kind as necessarily to destroy these avenues, or to injure or break down the plaintiff's drains, which go under the avenues; nor is the defendant, in my opinion, authorized by necessary implication to use tractors or other machinery in such a way or of such a weight as to destroy the plaintiff's avenues and drains.

I have no doubt that the defendant, if he desires in the interests of expedition to use this class of machine, will be able to adopt such measures as will prevent such injuries as I have indicated from occurring to the avenues, roads, passes, and drains. As regards leaving felled trees, tree-tops, and branches upon the lands, there was a considerable volume of evidence given on behalf of the plaintiff to show that there was serious blocking of the avenues and passes by felled trees and branches, which, in some instances, were allowed to remain for long periods obstructing the avenues and passes. I am satisfied that in regard to many passes timber and branches lay for a time very considerably beyond that reasonably necessary, causing injury to the plaintiff.

As regards the gaps in fences, the question in controversy between the parties on this branch of the case is as to the extent of the right of the defendant to make such gaps or openings in the fence as he considers suitable to himself. The outer fence around the demesne of Oriel Temple extends for a distance of about five miles. The fence as to the greater part of it consists of a mound, with thorn bushes in some places planted on the top; trees were standing in some places on the mound; in some places there were strands of wire which stretched between the thorn bushes; in some places there was a ditch or gripe on the inside, in some places on the outside, and in some places on both sides. To a less extent the outer fence consisted of a stone wall. I am satisfied on the evidence that this fence had not been efficiently kept up, and in many cases it was not effective for the purpose of keeping cattle from trespassing on the plantation; and I think that the owners of the demesne relied more on the inner fence than on the outer fence to prevent cattle from trespassing on the arable portion of the land. While this is so, I do not think that for this reason the defendant by making new gaps to a greater extent than he was entitled to do, if he did so, was justified in making it worse than it was and more liable to trespass, and more difficult and expensive to restore to a proper condition as an effective fence. I must find on the evidence that the defendant and his servants took out trees through the outer fence, and made gaps for that purpose in a number of places in which there had previously been no existing gaps, and I believe that a great number of gaps were made and a great deal of injury done to the fence which, on any view of the reasonable necessities of the case, caused avoidable and unnecessary damage to the plaintiff; that gates have been in fact removed by the defendant and his workmen and not restored, and that the defendant was right in the view that he expressed in his affidavit filed for the purpose of the interlocutory motion that he was liable to make good this damage. But I do not think that the statements in his affidavit can be taken to estop him from setting up in this case the legal defence which would arise from the existence of a custom or usage by which he would be authorized to make gaps in the fences wherever he chose if such a custom or usage has been established, and if such a custom or usage were held to be reasonable.

But I am dealing in this case with a very unusual class of contract, in reference to which, as I hold, no custom or usage has been proved, and therefore I do not think, in fairness to the defendant, that I ought to hold that his right to remove the timber here by drawing it through the fences, in a contract of this magnitude, and having regard to the situation of the timber in various places in this demesne, should be restricted to the exits actually in existence at the time of the making of the contract, and that he is not entitled to draw the timber through any other part of the fence without express permission in every case.

What, then, is the fair and reasonable implication to make in this case as regards this matter? I think it can be found on a fair construction of the defendant's own views as expressed in his affidavit. What he says he has done in the way of injury to the fence, and what he said as to his willingness to make good the damage, seems to me to be a clear indication of what he considered his rights and obligations were. He said that trees had been taken out on to the road through the outer fence, and gaps made for that purpose. This, of course, means gaps other than gaps and exits actually in existence at the time of the contract. He said that no damage not easily repairable, and which he will not make good, has been done on the fence, and he says that in doing this his firm only did what he was informed and believed was always done at Oriel Temple. He said that no unnecessary or avoidable damage was done to the owner's fence; that it was not always possible to prevent trees or branches falling so as to damage the fence; if anything of that sort had happened, the damage would be made good. Now he had, I presume, seen the locus in quo, and examined the outer fence and the inner fence before entering into the contract, and I do not see how I can put his rights in

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this matter upon any plane higher than or different from that on which he appears to have put them himself. And, therefore, I hold that he is entitled, in addition to using the existing exits, to make such other exits as may be reasonably necessary in particular instances by reason of the existing gaps not being reasonably convenient for being used in those instances. But in regard to the injuries done to the fence by the exercise of this right, I think that the plaintiff has a right to have the damage caused to the fences by the making of such gaps made good by the defendant. If the defendant desired to have conferred upon him more extensive rights, I think he should have stipulated for them in his contract. I am satisfied that he has exceeded his rights, so defined, very substantially.

As regards the holding of public auctions, I have not heard any satisfactory evidence which would lead me to the conclusion that there is any custom or usage authorizing the holding of auctions as an implied term of a contract to cut timber in a demesne. The holding of auctions bringing large numbers of persons into the demesne is not, I think, a right conferred on the defendant by implication or otherwise; but I am not satisfied, on the other hand, that the plaintiff has sustained any substantial damage by reason of the auctions that have, in fact, been held.

In my opinion, there must be an inquiry as to the damages sustained by the plaintiff in respect of matters to which I shall more particularly refer in a moment. Then, if the plaintiff is entitled to damages, is he entitled in addition to an injunction to prevent the continuance of the acts of injury to the plaintiff which the defendant claims to be entitled to do, and which, in my opinion, he is not entitled to do? Lord Lindley, in his judgment in *Shelfer* v. *The City of London Electric Lighting Co.* (1), quoted what Lord Kingsdown said in the House of Lords in *Imperial Gas, Light, and Coke Co.* v. *Broadbent* (2): "The rule I take to be clearly this: if a plaintiff applies for an injunction to restrain the violation of a Common Law right, if either the existence of the right or the fact of its violation be disputed, he must establish that right at law; but when he has established his right at law, I apprehend that unless there be something special in the case he is entitled as of course to an injunction to prevent the recurrence of that violation." After referring to Lord Cairns' Act, he says: "The jurisdiction to give damages instead of an injunction is in words given in all cases, but the use of the word 'damages' has led to a doubt whether the Act applies to cases where no injury at all has yet been inflicted, but where injury is threatened only. Subject, however, to this doubt, there appears to be no limit to the jurisdiction; but in exercising this jurisdiction thus given attention ought to be paid to well-settled principles, and ever since Lord Cairns' Act was passed the Court of Chancery has repudiated the notion that the Legislature intended to turn that Court into a tribunal for legalizing wrongful acts, or, in other words, the Court has always protested against the notion that it ought to allow a wrong to continue simply because the wrong-doer is able and willing to pay for the injury he might inflict." And later in his judgment he says: "Without denying the jurisdiction to award damages instead of an injunction, even in cases of continuing actionable nuisance, such jurisdiction ought not to be exercised in such cases except under very exceptional circumstances. I will not attempt to specify them or to lay down any rule for the exercise of judicial discretion. It is sufficient to refer, by way of example, to trivial and occasional nuisance, cases in which the plaintiff has shown that he only wants money, vicious and oppressive cases, and cases where the plaintiff has so conducted himself as to render it unjust to give him more than pecuniary relief. In all such cases as these, and in all others where an action for damages is really an adequate remedy, as where the acts complained of are already finished, an injunction can properly be refused." And I adopt the next sentence of the learned Lord Justice as applicable to this case: "There are no circumstances here which, according to recognized principles, justify the refusal of an injunction." The judgments of Lord Halsbury and of Lord Justice A. L. Smith on the same subject are to the same effect. The only class of case that I am aware of in which the right to damages has been held to exclude the right to an injunction is where liquidated damages are by the contract provided for a breach.

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(1) [1895] 1 Ch. 287.

(2) 7 H. L. C. 612.

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I will grant an injunction to restrain the defendant from using the saw-mill or saw-mills for the purpose of manufacturing sleepers, brush-heads, etc., and from hauling and piling logs for such purpose on the avenue adjoining the mill, or for any purpose other than the purpose of facilitating the removal of the timber; but I will not order any inquiry as to damages on this head.

In respect of the extent of the excess of area cleared for the purpose of erecting mill No. 2, the plaintiff is entitled to an inquiry as to damages; but I do not consider there is any necessity for making an order for an injunction in respect of this matter. I do not consider that there is any apprehension that the defendant will increase the damage in this respect; but I will make a declaration that the defendant is not entitled to maintain an exit from the saw-mill to the public road of a width greater than is reasonably necessary for the removal of timber from the saw-mill. As regards the injury to the avenues, there will be an inquiry as to the damage sustained by the defendant by reason of injury done to the avenues, so far as that injury has rendered them incapable of being reasonably used by the plaintiff for the ordinary purposes of his mansion-house and farm. This will include any injury done to the drain under or alongside the main avenue, and I will grant an injunction to restrain the defendant from destroying, injuring, or damaging the said avenue or drain so as to render them, the avenues and farm roads, incapable of being used for the ordinary purposes of the plaintiff's mansion-house and farm, and as to the drain incapable of being effectively used as such.

For the reasons that I have stated earlier, the plaintiff is entitled to an inquiry as to the damage sustained by him by reason of the defendant allowing felled trees and tops and branches of same to remain upon his avenues and elsewhere for an unreasonable time. Having regard to his very clear statement that he claimed the right to do all the acts complained of in the statement of claim, I must grant an injunction in respect of this matter also, and the injunction will be to restrain the defendant from leaving felled trees on the plaintiff's avenues or passes or arable land beyond a reasonable period of time.

There will be an inquiry as to damage sustained by the plaintiff by reason of injury to the fences caused by dragging timber through the fences other than through gaps existing at the time of the making of the contract, or in making gaps other than such existing gaps, and other than in such places as can be shown to have been reasonably necessary to have been made for the purpose of removing timber by reason of the said existing gaps not being reasonably capable of being used for the removal of such timber, the damages in the last-mentioned case being limited to the cost of repairing the said gaps. The inquiry as to damages will extend to any injury caused to the plaintiff by the defendant having gates open upon the lands for an unreasonable period in places in which gates had been placed before being removed by the defendant. There will be an injunction to restrain the defendant from making any new gaps or exits in the fences other than such gaps or exits as may be reasonably necessary by reason of the exits and gaps in existence at the time of the contract not being reasonably capable of being used for the removal of the timber; and there will be a declaration that in respect of such new gaps or exits the defendant will be bound to repair the same at such time or times as the said gaps or exits may no longer be necessary for such purposes; and there will be an injunction requiring the defendant to restore to their position such gates as have been removed by him, and restraining the defendant from leaving gates open for an unreasonable period.

There will be an injunction restraining the defendant from holding public auctions on the lands for the sale of timber; but I will not order any inquiry as to damages in respect of public auctions already held.

Solicitor for the plaintiff: *M. J. O'Connor.*
Solicitor for the defendant: *J. Charley M'Dowell.*

M. G. B.

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CONGESTED DISTRICTS BOARD *v.* ATTORNEY-GENERAL (1).

(1919. No. 1035.)

Land Purchase—Congested Districts Board—Expenditure on improvements—Sale to tenants at enhanced price—Advances for the purpose of the Land Purchase Acts—Repayment in cash or in Land Stock—Irish Land Act, 1903 (3 *Ed.* 7, *c.* 37), *sect.* 72, *sub-s.* 3—*Irish Land Act,* 1909 (9 *Ed.* 7, *c.* 42), *sect.* 3.

Sect. 72, sub-s. 3, of the Irish Land Act, 1903, provides that where the Congested Districts Board have expended money on the improvement of an estate, and in consequence have sold parcels of that estate at an enhanced price to tenants or others, the National Debt Commissioners may advance to the Land Commission, for repayment to the Congested Districts Board, such sums as represent the increase of price consequent on the improvements. Sect. 3, sub-s. 1, of the Irish Land Act, 1909, provides that advances for the purposes of the Land Purchase Acts may be made in whole or in part by means of stock. In this case the owner whose estate was acquired by the Board, and subsequently re-sold by them, was paid the purchase price in Land Stock.

Held (reversing Powell J.), that the Congested Districts Board were entitled to repayment of the increase of price consequent on improvements only in stock and not in cash.

Appeal from an order made by Powell J. on the 23rd July, 1920, declaring that the Congested Districts Board were entitled to repayment by means of money of such sums as from time to time became payable to them under the provisions of sect. 72, sub-s. 3, of the Irish Land Act, 1903, in cases where they had expended money on the improvement of an estate and in consequence had sold parcels of the estate at an enhanced price to tenants and others, and had become entitled to repayment as provided by the section of such sums as represented the increase of price consequent on the improvements.

The facts appear in the report in [1920] 1 I. R. 266.

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(1) Before Molony C.J., and Ronan and O'Connor L.JJ.

Babington K.C., *E. S. Murphy* K.C., and *Newett*, for the appellant, the Attorney-General.

S. L. Brown K.C., *Leonard* K.C., and *J. M. FitzGerald*, for the respondents.

June 28.

Molony C.J. :—

Under the Congested Districts Board Acts, 1891 to 1909, the Board have power to purchase land under the provisions of the Irish Land Purchase Acts for the re-sale thereof to tenants. The sums required by the Board for the purchase of land are paid to them out of advances made by the National Debt Commissioners to the Land Commission, and it is provided that all payments so made shall be deemed to be advances made to the Land Commission for the purposes of the Land Purchase Acts: Irish Land Act, 1903, sect. 72, sub-s. 1. Sect. 72, sub-s. 3, of the Act is in the following terms: "Regulations made by the Treasury may provide that where the Congested Districts Board have expended money on the improvement of an estate, and, in consequence, have sold parcels of that estate at an enhanced price to tenants or others, the National Debt Commissioners may advance to the Land Commission for repayment to the Congested Districts Board such sums as represent the increase of price consequent on the improvements."

The Act of 1903 contemplated vendors being paid in cash, but this was changed by the Act of 1909 to payment in stock.

In the present case the plaintiffs purchased certain lands in the County of Galway at the price of £1,024, to be provided and paid in 3 per cent. Guaranteed Land Stock. They then expended in improvements the sum of £77 12*s.* 7*d.* in actual money, and, after the execution of the improvements, they re-sold the whole of the lands in separate parcels or holdings at the enhanced price of £1,090, also payable in stock. The net gain on the purchase and re-sale was, therefore, the sum of £66 stock; but the plaintiffs contend that under the provisions of sect. 72, sub-s. 3, they are entitled to the repayment of the said sum of £66 in money.

The entire case turns upon the meaning of the words "enhanced price" in the section. Previous to 1909 the enhanced price could only be measured in money, because the purchase and re-sale would be estimated in money; but, since 1909, when the purchase-money, both on the sale and re-sale, is necessarily estimated in Land Stock, it seems to me to follow that the enhanced price must be estimated upon the same basis. It was intended that the Treasury should pay the difference between the two values; but it was never intended that the Treasury should pay in cash something more than was represented by that difference. No matter what the amount spent on improvements might be, the Treasury could only pay the enhanced price in consequence of the improvements; and it is perfectly clear that in the present case the enhanced price consequent on the improvements is £66, payable in Land Stock, and no more.

The plaintiffs' case has been mainly based on the argument that moneys advanced to the Land Commission for repayment to or recoupment of the plaintiffs, as provided by sect. 72, sub-s. 3, are not "advances for the purpose of the Land Purchase Acts within the meaning of sect. 3 of the Irish Land Act, 1909." There is, no doubt, a great deal to be said in favour of that view; but, even assuming this in favour of the plaintiffs, I am still clearly of opinion that it does not support the inference sought to be drawn from it, that the plaintiffs in the present case are entitled to the repayment of the sum of £66 in money instead of in stock. The declaration which was sought by the plaintiffs in this case, and granted by Powell J., is ambiguous, as, of course, the Treasury is quite prepared to pay the plaintiffs by means of money the cash value of the stock; but what the plaintiffs really seek is to obtain in cash the face value of the stock, which is an entirely different matter.

In my opinion the declaration granted by Powell J. should be discharged, and in lieu thereof an order should be made in the following terms:—It appearing to the Court that the price of £1,024 and the enhanced price of £1,090 mentioned in pars. 5 and 6 of the statement of claim, respectively, were in fact paid by the transfer of sums of £1,024 and £1,090 3 per cent. Guaranteed Stock, which were duly accepted as payment thereof pursuant to sect. 3 of the Irish Land Act, 1909, and that the entire increase of price was consequent on the improvements made by the plaintiffs by means of the sum of £77 12*s.* 7*d.* expended by them, the Court doth declare that the increase of price consequent on the said expenditure is a sum of £66 of the said stock, and that the plaintiffs are only entitled to receive that amount of the said stock or its equivalent value in cash.

Ronan L.J.:—

The facts and statutes have been fully stated in the judgments of Powell J.

It is admitted in the present case that the "increase of price" was entirely due to the expenditure by the Congested Districts Board, and therefore that increase is the sum to be repaid to them by the State, being the amount of profit realized by the State from their expenditure. In my opinion that increase in the present case was £66 stock, not £66 cash. To explain my reasons for this, I shall take prices in round numbers, as being more easily dealt with than those in the present case. I shall take the same transaction in substance, viz., a purchase by the Congested Districts Board at £1,000, and a re-sale by them at £1,100: 1, where both were prior to the Act of 1909; 2, where both were subsequent to that Act; 3, where the purchase was prior and the re-sale subsequent to that Act; where in all three the Board spent £200, and thereby increased the price by £100, or 10 per cent. of the original purchase price. Sect. 72 of the Act of 1903 applies in all three cases.

The machinery and mode of carrying the transactions through have been fully explained by Powell J. It comes to this. The State advanced the purchase-money in all cases to the purchaser. In the case of the purchase they paid the purchase-money to the purchaser, and debited the Congested Districts Board with it; and in the case of the re-sale they retained the amount of the advance, and credited the Congested Districts Board with it. But the Congested Districts Board were only entitled to be repaid so much of the increase of price as was due to their expenditure. Here the whole increase (£100) is assumed to be "consequent on the expenditure," so that all we have to do is to

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Ronan L.J.

find the actual increase of price; that is got by deducting the purchase price from the re-sale price, and, on the assumption made in this case, that is the sum to be repaid. Up to the passing of the Act of 1909 these transactions—purchase, expenditure, advance, and re-sale—were all cash transactions, and there was no difficulty in the matter. It was simply £1,100 - £1,000 = £100. I have taken these figures for convenience. It will be seen that the increase is one-tenth of the original price.

The Act of 1909, however, provided that in future advances should be made in stock, and not in cash, as under the Act of 1903. The machinery for carrying out transactions was the same as before, except that in lieu of cash the State gave the purchaser stock, and debited the Congested Districts Board with this amount of stock, and in lieu of cash the State credited the Congested Districts Board with the amount of stock advanced to the purchaser from the Congested Districts Board. Sect. 3, sub-s. 4, of the Act of 1909 is, to my mind, the vital section in this case. It provides that stock shall, as between vendor and purchaser, be accepted by the vendor as the equivalent of the corresponding amount of the purchase-money. This clause must be read into every agreement under the Acts after the passing of the Act of 1909.

It is remarkable that in the agreement by the Congested Districts Board for purchase, in respect of which they are to be debited, it appears from the statement of claim, par. 5, there is an express provision embodying the terms of this section imposing the liability on them to accept stock for the price specified; while in par. 6, stating the agreement where they are vendors, they do not refer to their right to pay in stock when they are claiming credit.

I shall now assume that the cash value of £100 stock is £50 (not far from the actual value), and that this value does not change during the transactions. If the price in the contract is £1,000, this enables the purchaser to pay it by giving £1,000 stock, which he can buy for £500. Having regard to this, it is obvious that where the parties have agreed on the price, say £1,000, as the sum which one is willing to pay and the other to accept, the agreement must describe the price as £2,000, as what will pass is £2,000 stock = £1,000 cash. So that the form the two transactions would have taken after 1909 would be—purchase, £2,000; re-sale, £2,200; enhancement, £200. But the £2,000 and £2,200 are in fact stock, so the £200 must be stock. It will be seen that this is, as in the original case, one-tenth of the purchase price, and this £2,000 stock exactly repays the £100 of the expenditure to which the Congested Districts Board are entitled.

Mr. Brown says, no; the actual prices mentioned must be taken, and the increase must be taken as cash. To put his contention in plain words and figures, it is this: the Congested Districts Board are entitled to the increase of price. Sale price, £2,000 stock = £1,000 cash; re-sale price, £2,200 stock = £1,100 cash; increase, £200 stock = £100 cash. He says the increase is £200 cash = £400 stock. The thing is obviously absurd. The absurdity appears all more clearly in the third case: 1908, sale price, £1,000 cash; 1911, re-sale price, £2,200 stock = £1,100 cash. What is the increase of price here? According to Mr. Brown's argument, we must take the actual figures in the agreements. They are £2,200 and £1,000. Is the increase of price the difference between the two in cash, viz., £1,200 or 120 per cent. of the original price in the place of 10 per cent.? This is really the reductio ad absurdissimum of the argument.

An agreement to sell for £1,000 payable at purchaser's option by delivery of 1,000 pounds in money or 1,000 pounds of tobacco is really the same thing in principle as the alternative of paying in stock. If the purchaser pays in tobacco or stock, the transaction is really one of exchange or barter, not of sale or purchase. Increase of price in such a case can only mean the increase in the consideration; and if it is to be expressed in money, it can only be done by ascertaining the money value of the consideration in each transaction.

It is admitted that sect. 72, sub-s. 3, must apply in the three cases I have mentioned. In the third it can only be done by turning the stock on the re-sale into its cash value. In the second it may be done either by turning both sums of stock into cash, or simply, as was done in this case, by handing over the actual increase in the amount of stock (assuming, as I have done, that the value was the same at both dates).

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O'CONNOR L.J. :—

Notwithstanding the elaborate judgment of Powell J., I think this is a very simple case, and that the Treasury are clearly right. The Congested Districts Board, in 1913, bought an estate for £1,024 Land Stock, which was paid to the vendor on the 7th March, 1918; they sold it in several parcels later; and on the re-sale they received—that is to say, they were credited in the books of the Land Commission with—£1,090 Land Stock. The sole question in the case is, what was the increase in price? Obviously £66 Land Stock; not £66 cash. The argument adduced on behalf of the Congested Districts Board rests on an entire misapprehension. The Board say, in effect: "The sale was a sale for cash, because the tenant pays his annuity in cash." There is an obvious non sequitur in this reasoning. What the vendor receives is the purchase-money, to wit, £1,090 Land Stock. The tenant pays back that Land Stock, or its equivalent, by money annuities, which include payment of interest and payment of capital; the annuities are the financial equivalent of £1,090 Land Stock, and not of £1,090 cash; if the purchase-money were £1,090 cash, the annuities would be very much greater if they were to be (as they must be) the financial equivalent of the loan. What I say in this connexion is borne out by the section (1) to which I drew counsel's attention during the argument, enabling the tenant purchasers to redeem by the payment of cash sufficient, according to Treasury Regulations, to extinguish, at the price of the day, Land Stock to an amount equivalent to the Land Stock which the vendor has received, or so much thereof as is outstanding. In this particular case, where the advance of £1,090 Land Stock was made on the 7th of March, 1918, the cash required to redeem the advance, as we are informed by the Land Commission, would, on the 8th of March, 1918, be the sum of £671 10*s*. 10*d*. I agree in the order as suggested by the Lord Chief Justice.

Solicitor for the appellant: *P. Coll.*

Solicitor for the respondents: *J. O'Connor.*

C. L.

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(1) Irish Land Act, 1903 (3 Ed. 7, c. 37), s. 46.

JOHN J. EGAN *v.* GENERAL MACREADY AND OTHERS.
(1921. No. 572.)

M. R.
1921.
July 6, 7, 8, and 26.

Martial law—Habeas corpus—State of war—Prerogative of Crown—Defence of the Realm Consolidation Act, 1914 (5 *Geo.* 5, *c.* 8)—*Restoration of Order in Ireland Act*, 1920 (10 & 11 *Geo.* 5, *c.* 31)—*Military Courts—Court-martial—Disobedience to writ of habeas corpus—Writ of attachment against military authority.*

The prisoner E. was arrested and charged with committing an offence "in that he, on the 26th day of May, 1921, near Quin, Co. Clare, in Ireland, was improperly in possession of ammunition, namely, ninety-seven rounds of revolver ammunition and five rounds of service ammunition."

On this charge he was brought before a military Court, not a Court-martial, consisting of some military officers, and was convicted and sentenced to death. On an application to make absolute a conditional order for habeas corpus notwithstanding cause shown:

Held, that a state of war being in existence at the date of the passing of the Restoration of Order in Ireland Act, 1920, the executive powers of the military authorities were limited by that Act, and that accordingly an offence punishable by death could be tried by no other military tribunal than a Court-martial. Conditional order for issue of a writ of habeas corpus made absolute.

Marais's Case, [1902] A. C. 109, distinguished.

R. v. *Allen*, [1921] 2 I. R. 241, not followed.

Motion on Notice to make absolute notwithstanding cause shown a conditional order dated 14th June, 1921, for the issue of a habeas corpus directed to the defendants, the Right Honourable Sir Frederick Cecil Nevil Macready, Commander-in-Chief of the Forces in Ireland, Major-General E. P. Strickland, and Brigadier-General Cameron, and the Governor of His Majesty's Male Prison in Limerick.

The facts and circumstances of the application sufficiently appear from the following extracts from the affidavit of Mr. John B. Lynch, of Ennis, solicitor for the prisoner:—

2. I acted for the said plaintiff in connexion with a charge which was preferred against him by the military authorities for having, as alleged, committed an offence in that he on the 26th day of May, 1921, near Quin, County Clare, in Ireland, was improperly in possession of ammunition,

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namely, ninety-seven rounds of revolver ammunition and five rounds of service ammunition. The said charge was investigated by a military Court assembled at the New Barracks, in the City of Limerick, on the 11th day of June, 1921. I was present during the entire progress of the said investigation, and instructed counsel on behalf of the said plaintiff. The deponent referred to a document headed "charge-sheet," sent to me by the military authorities as solicitor for the plaintiff, upon which A, &c., a copy of this document was served on the accused.

3. At the said investigation evidence for the prosecution was given to the effect that at a place on the public road, between Ennis and Quin, on May 26th, 1921, witnesses in a military motor lorry observed the plaintiff cycling towards them at a time when the lorry was coming round a bend in the road, and that they saw the plaintiff get on to the space between the road and wall fencing same, get off his bicycle, throw a parcel over the wall, and attempt to get over the wall himself; that one of the witnesses for the prosecution then got over the wall and picked up in the field a parcel which contained the ammunition referred to in the charge. It was admitted by the witnesses for the prosecution that plaintiff was about thirty yards from the lorry when first observed, that the lorry was going at twenty miles an hour, and plaintiff cycling at a moderate pace, and that the time during which the witnesses for the prosecution could have observed the plaintiff doing the act alleged was approximately two seconds. Evidence was given on behalf of the plaintiff that he was proceeding on his ordinary business from Ennis to Sixmilebridge to repair a motor engine, the property of the Clare County Council (he being a motor engineer under the Council) in accordance with a prior arrangement made; a number of witnesses proved that they met him at various points on the road between Ennis and where he was arrested, and that he had no parcel; other witnesses examined for the plaintiff proved that two men were seen in the vicinity of the place where the parcel was found, who ran away when the lorries approached, but escaped through the fields, although fired on by the military. It was admitted by one of the witnesses for the prosecution that this firing was a "matter of minutes" after the arrest of the plaintiff, and about 100 yards away from where he was arrested. The plaintiff elected to give evidence on oath as to these facts before his counsel stated the defence, and before the other witnesses on behalf of the plaintiff were examined. The plaintiff was not cross-examined by the prosecutor.

At no stage of the proceedings was any evidence given before or document handed in to the tribunal to show that the alleged offence took place in a martial law area, neither was any evidence given before the tribunal as to the existence or publication of any proclamation attaching the death penalty to the offence alleged in the said charge-sheet. It was also admitted by the prosecution that there were no previous convictions against the plaintiff. A short time after the conclusion of the said investigation the plaintiff was informed that he had been convicted of the said charge and sentenced to death.

In reply, an affidavit was filed on behalf of the Crown similar to that sworn by the Rt. Hon. Sir Cecil Frederick Macready in *R.* v. *Allen* (1), in which General Macready deposed that " a state of open rebellion still existed in, amongst other places, the county of Clare and adjoining districts, such state of rebellion amounting to actual warfare of a guerilla character."

On behalf of the prisoner several affidavits were filed from persons residing in the county of Clare and the town of Ennis traversing the averment that a state of war existed in the county of Clare and adjoining districts. The several deponents alleged that the business of the last Assizes, Quarter Sessions, and Petty Sessions, had been carried on in the usual way, and that trade, business, and the ordinary affairs of life had been conducted in a peaceful and quiet manner, and that in no way could the county of Clare or town of Ennis be described as being in a state of war or open rebellion.

Lynch K.C. (with him *Kennedy K.C.* and *Costello*), for the prosecutor, contended that the applicant should have been brought before one of the special Courts provided by the Restoration of Order in Ireland Act, 1920, or to a civilian Court, and submitted that even if a state of war did exist it did not justify the setting up of a military Court like this as distinct from a Court-martial. When Parliament provided exceptional legislation for dealing with this or any other offence, it was illegal to substitute for the statutory tribunal a mere committee of officers. The conditional order should be made absolute.

Conner K.C. (with him *E. S. Murphy K.C.* and *Lipsett*), for the respondents:—

Since the beginning of legal time, it had never been suggested otherwise, and it was taken to be the law, that once a state of war is shown to exist all proceedings by the military are outside the cognisance of the ordinary civil tribunals. The King's Bench had followed this rule of law in *Allen's Case* (1). The application on behalf of the prisoner was based on the assumption that the military Court which tried Egan was an illegal Court.

(3) [1921] 2 I. R. 244.

They submitted that the expression used in the Restoration of Order in Ireland Act, 1920, "owing to the state of disorder in Ireland," did not refer to a state of war or rebellion. In the great pressure put on the military authorities it would be very difficult to carry out these proceedings in every case by Court-martial. These so-called military Courts are not subject to the rules of Court, and their proceedings cannot be inquired into. They submitted that the Court had no jurisdiction to grant the order asked for.

Kennedy K.C., in reply :—

While the King's Courts are sitting no other Court has jurisdiction in such a case as the present. The military authorities had no power to travel outside the Restoration of Order in Ireland Act. Why should not the prisoner have been tried under this Act? He was entitled to be tried as an ordinary citizen. He was not charged with levying war or with being engaged in active warfare. He was only charged with being in possession of ammunition which might have been thrown into his garden by some person, and he might have been trying to get rid of it, if he had it at all. The limit of the martial law theory had been extended, not by any decision in England, but unfortunately by a recent decision in Ireland. The judgment in *Allen's Case* (1) had shocked legal opinion in England, where it was described as a new orientation of the martial law theory. The prisoner was entitled to the relief asked for.

Cur. adv. vult.

O'CONNOR M.R. :—

In this matter a conditional order was made on the 14th June, 1921, for the issue of a writ of habeas corpus, directed to the Commander of the Forces in Ireland and others, for the production of the body of John Joseph Egan. Cause has been shown against this order, and a motion has been made on behalf of Egan that the conditional order be made absolute notwithstanding the cause shown. The circumstances in which the conditional order was made are stated in the affidavit of Mr. John B. Lynch,

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(1) [1921] 2 I. R. 244.

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solicitor for Egan. They are as follows:—A charge was preferred against Egan by the military authority for "committing an offence in that he on the 26th day of May, 1921, near Quin, County Clare, in Ireland, was improperly in possession of ammunition, namely, ninety-seven rounds of revolver ammunition and five rounds of service ammunition." On that charge Egan was brought before a military Court, not a Court-martial, but a Court constituted in some way unknown to the law, of some military officers. This Court, or so-called Court, assembled at the new barracks in the City of Limerick on the 11th day of June, 1921, and Egan was shortly after informed that he had been convicted and sentenced to death. On these facts it was almost a matter of course that a conditional order for a writ of habeas corpus should go. There were two elements present. The Court, which assumed jurisdiction, had no legal status whatever. The penalty awarded—a death sentence—for the offence charged has no sanction from British law.

But cause was shown by the military authority against the conditional order. Affidavits were made by the Commander of the Forces and by Colonel Brind, Senior General Staff Officer in the Irish Command, which prove (if it were necessary to prove what this Court has judicial notice of) that a state of open rebellion has been for a considerable time and is still existing in Ireland, and that its object is the overthrow of the King's Government as by law established. It is further proved that this insurrection has been prosecuted by the murder of military officers, soldiers, and policemen, by attacks on barracks and railway trains, by the destruction of railway cabins, signalling apparatus, and telegraph wires, by the trenching of public roadways so as to prevent the movement of troops, and by every method of irregular war. All these operations have been carried out by a body called the Irish Republican Army. Indeed, the affidavits leave no room for doubt that there is a widespread rebellion amounting to a state of war with which the ordinary guardians of the public peace cannot cope, and which urgently requires for its suppression the military forces of the Crown.

In this state of affairs the help of the army was invoked, and the military authority has cast on it the duty of suppressing the rebellion and restoring order in the country. The cause shown is to be found in the emergency of the situation as I have described it; but it remains to be seen whether it deprives the liege subjects of the King of the protection which the Common and Statute Law of the British Constitution affords them.

It is urged on behalf of the military authority that the situation is a state of war which necessitates military operations for the public safety, and that no act done in the course of these operations is subject to the jurisdiction of the King's Courts. The principle salus populi suprema lex is invoked in support of this proposition, and the judgment of the Privy Council in *Marais's Case* (1) has been confidently cited as establishing it beyond question. The judgment is no doubt of the very highest authority. It was delivered by Lord Halsbury, and it had the concurrence of Lord Macnaghten, Lord Shand, Lord Davey, Lord Robertson, and Lord Lindley. No more eminent Court can be imagined; and in the clearest and most emphatic language the law has been laid down in the following words:—"The truth is that no doubt has ever existed that where war actually prevails the ordinary Courts have no jurisdiction over the action of the military authorities. Doubtless, cases of difficulty arise where the fact of a state of rebellion or insurrection is not clearly established. It may often be a question whether a mere riot or disturbance, neither so serious nor so extensive as really to amount to a war at all, has not been treated with excessive severity, and whether the intervention of the military force was necessary; but once let the fact of actual war be established, and there is a universal consensus of opinion that the civil Courts have no jurisdiction to call in question the propriety of the action of military authorities." There is no ambiguity about this. It is a clear enunciation of the proposition that no matter what the act of the military authority may be, no matter what the punishment meted out to any member of the community, be he soldier or civilian, it is not justiciable by the civil tribunal. This judgment was very properly subjected to criticism by Mr. Lynch in his able argument. He pointed out that the generality of the language was entirely unnecessary for the cases before the Privy Council.

(1) [1902] A.C. 109.

He called attention to the fact that the act complained of was only the arrest of the petitioner pending a state of war within the war area—a minor punishment, if a punishment at all, possibly a mere act of precaution by the military authority—and that a judgment in such a case ought not to be held to govern one in which the death sentence has been imposed. I confess that I am immensely struck by this contention, and all the more when I bear in mind the comment of the eminent jurist Professor Dicey on *Marais's Case* (1), to the effect that it must be read as applicable to the particular facts proved, and should not be taken as an exposition of the whole law.

Assuming, however, that the judgment in *Marais's Case* (1) is one of universal application, there is an element in the present case which requires to be specially dealt with.

The powers of the military authority are derived from the prerogative of the Crown, and we are confronted with the question whether that prerogative has been limited, and to what extent, by the Restoration of Order in Ireland Act, 1920. It cannot be denied that the prerogative of the King may be limited by an Act of Parliament, which has the sanction of the three estates of the realm, including His Majesty. It is therefore a question of the construction of the Act, and as such I approach it. The first section enacts:—[His Honor read the section (2).]

It was contended by counsel for the military authority that the "state of disorder" mentioned in the section was not intended to refer to a state of insurrection amounting to a state of war. In my opinion there is nothing in the Act which justifies any such limitation, and I think that the whole scope of the Act requires it to be read as applying to something very different

(1) [1902] A. C. 109.

(2) Section 1.—Where it appears to His Majesty in Council that owing to the existence of a state of disorder in Ireland, the ordinary law is inadequate for the prevention and punishment of crime or the maintenance of order, His Majesty in Council may issue regulations under the Defence of the Realm Consolidation Act, 1914 (hereinafter referred to as the principal Act), for securing the restoration and maintenance of order in Ireland, and as to the powers and duties for that purpose of the Lord Lieutenant and the Chief Secretary, and of members of His Majesty's forces and other persons acting on His Majesty's behalf.

from mere riot, or tumult, or general social disturbance. It must, in the first place, be remembered that the Restoration of Order Act is supplemental to the Defence of the Realm Consolidation Act, 1914, which dealt with the state of war. This latter Act is referred to as the principal Act in the Restoration of Order Act, and it is under the principal Act that the regulations giving powers to the military authority are to be issued. Both Acts must be read together, and the principal Act must give its colour to the supplemental Act. But this is by no means the only guide we have to the scope of the Restoration of Order Act. By it Courts-martial are invested with jurisdiction over the whole civil population for the trial of crimes, and crime is defined as including treason and treason felony. In other words, the ordinary functions of the civil Court in criminal matters are suspended and transferred to the military authority. This is certainly very like a state of war. It is wholly inconsistent with civil government. Let me now come to the regulations issued under the Act. No one can read them without seeing that they provide for a state of war properly so called. They give powers for the occupation and control of land, the control of food supplies and war material, the requisitioning of factories for the manufacture of arms and ammunition, the unauthorized collection and communication of military information, entry into a special military area, and many other matters, clearly indicating that the regulations dealt with a state of war.

It was sought to limit the meaning of "a state of disorder" by the contention that although a state of war is now existing, it did not exist at the date of the passing of the Restoration of Order Act, and that there was then only a general state of lawlessness for which special powers were required. If this were the case, I doubt if it would control the expressed meaning of the Act, but the assertion is contradicted by the affidavit of General Macready. I refer to the fourth paragraph, in which he says: "It is clear that a state of rebellion amounting to war . . . is, and has been before and since the said 1st January, 1921, raging." He does not there bring the present state of affairs back to the date of the Act, but he does so in the fifth paragraph by referring to the publication of a newspaper or organ called "An T'Oglac," dated January 31st, 1919, which declared a state of war to exist between England and Ireland. Indeed, the manifest intention of General Macready's affidavit was to show that a state of war has existed for a considerable time, and that it existed so far back as 1919. I cannot, therefore, entertain any doubt that the Restoration of Order Act covers an insurrection amounting to a state of war.

Here, then, we have a very special case—a state of war within the kingdom—a war against the King and his loyal subjects. The military forces of the Crown are called in aid, and Parliament, with the intention of legalizing the operations of the military authority, and at the same time safeguarding the subjects of the King, passes an Act giving the military special powers, but imposing conditions. Is it to be said that the military authority is to be entitled to disregard the conditions because, in their opinion, the special powers conferred are not sufficient for the emergency? This is the entirely new question which distinguishes the present case from *Marais's Case* (1) and all others which have preceded it.

What are the powers of the military authority as conferred by the Act, and what are the limitations imposed? There is a power to try any person, whether military or civilian, whether rebel or loyalist, by Court-martial, but, in the case of a trial for an offence punishable by death, the Court-martial must include one member nominated by the Lord Lieutenant and certified to be a person of legal knowledge and experience. In my opinion this enactment means this, and this only, that an offence punishable by death shall be tried by no other military tribunal than a Court-martial constituted as prescribed.

Again, there is the enactment that any crime when tried by Court-martial shall be punishable with the punishment assigned to the crime by Statute or Common Law. I can give to this no other meaning than that a crime shall not be punishable by any greater punishment. Can it be contended that the military authority invested by Parliament with this special power—with these special limitations—is entitled to ignore the Act? Is it for the military authority to say:—no doubt the Act was passed

(1) [1902] A. C. 109.

to meet an emergency, but we find the emergency greater than was contemplated, and we are of opinion that we must be absolutely unrestrained, and we shall act as we think right, no matter what the Act of Parliament? A Court-martial specially constituted was prescribed for us, but we won't have a Court-martial. We shall have a Court of our own, constituted as we think right—perhaps of a lance-corporal and two privates (for thus far the argument must be pushed). Further, we must fix our own punishments. We cannot be limited by any Act of Parliament. And this is to be said although Parliament is in full session, and the Ministers of the Crown must be fully and from day to day informed of every important event in the state of war. If the emergency is greater than was contemplated, is it not for Parliament to give further powers or to remove the limitations imposed? I cannot assume that Parliament is in a lethargic condition, incapable of energetic action.

The proposition of the military authority is that there can be no limitation of the prerogative of the Crown in a state of war, even though imposed by Act of Parliament. In my opinion this proposition is inconsistent with the Code of which the Restoration of Order Act is a part. I have already referred to the Defence of the Realm Consolidation Act, 1914, which is the principal Act. There is also the Defence of the Realm (Amendment) Act, 1915. No doubt this Act is, by sect. 1, sub-s. 5, of the Restoration of Order Act, made inapplicable to proceedings before a Court-martial in respect of a crime or an offence against the regulations save as provided by sect. 2 of the Defence of the Realm (Amendment) Act. This latter Act has, therefore, no direct bearing (save in the matter excepted) on the Restoration of Order Act, but it throws a light on the constitutional question I am dealing with. The Defence of the Realm Acts deal with a state of war. The original Act gave a Court-martial jurisdiction over civilians as if they were persons subject to military law. The Amendment Act qualified this by giving civilians the right to be tried by a civil Court with a jury. Now, according to the case presented here by the military authority, if England itself became the theatre of war, the military authority could have disregarded this provision, and tried anyone in any way it chose. But evidently Parliament did not think so, because by sect. 1, sub-s. 7, it was provided that in the event of invasion or other special military emergency His Majesty might by proclamation forthwith suspend the operation of the section. There was no necessity for this if the emergency per se relieved the military authority from the obligations of the Act.

For these reasons, I am forced to the conclusion that the present case is taken out of the class which is ruled by *Marais's Case* (1). This is the case of a military emergency for which a special mode of action is provided by Parliament. The Act is not merely enabling, but prohibitory. The military authority, like any other department of the State, is subject to the supreme Court of the realm. To hold that, notwithstanding the Restoration of Order Act, the military authority can waive aside Courts-martial, and sweep away the limitations as to punishment, would really involve the proposition that express legislation that the existing rebellion was not to warrant the holding of military Courts would not be binding. This would be a new development of British Constitutional Law, for which I can find no authority. The claim of the military authority to override legislation, specially made for a state of war, would seem to me to call for a new Bill of Rights. But there is no warrant for any such claim. It is directly negatived by the judgments in the *De Keyser Case* (2). We have this passage in the judgment of Swinfen-Eady M.R. in the Court of Appeal :—" Those powers which the executive exercises without Parliamentary authority are comprised under the comprehensive term of the prerogative. Where, however, Parliament has intervened, and has provided by statute for powers previously within the prerogative being exercised in a particular manner, and subject to the limitations and provisions contained in the statute, they can only be so exercised. Otherwise what use would there be in imposing limitations if the Crown could at its pleasure disregard them all and fall back on the prerogative ? " (3) This was referred to with approval by Lord Dunedin in his judgment in the House of Lords. Lord Atkinson's judgment is to the same effect. If I may venture to say so of a Judge in his distinguished and exalted position, he has crystallized

(1) [1920] A. C. 109. (2) [1920] A. C. 508. (3) [1919] 2 Ch., at p. 216.

the law in language which ought to find its way into every text-book on constitutional law. He said:—"It is quite obvious that it would be useless and meaningless for the Legislature to impose restrictions and limitations upon, and to attach conditions to, the exercise by the Crown of the powers conferred by a statute, if the Crown were free at its pleasure to disregard these provisions, and by virtue of its prerogative do the very thing the statutes empowered it to do. One cannot in the construction of a statute attribute to the Legislature (in the absence of compelling words) an intention so absurd. It was suggested that when a statute is passed empowering the Crown to do a certain thing which it might theretofore have done by virtue of its prerogative, the prerogative is merged in the statute. I confess I do not think the word 'merged' is happily chosen. I should prefer to say that when such a statute, expressing the will and intention of the King and of the three estates of the realm, is passed, it abridges the Royal prerogative while it is in force to this extent: that the Crown can only do the particular thing under and in accordance with the statutory provisions, and that its prerogative power is in abeyance. Whichever mode of expression be used, the result intended to be indicated is, I think, the same, namely, that after the statute has been passed, and while it is in force, the thing it empowers the Crown to do can thenceforth only be done by and under the statute, and subject to all the limitations, restrictions, and conditions by it imposed, however unrestricted the Royal prerogative theretofore may have been."

There is just one argument which seems at first blush to establish the right of the military authority to try, convict, and execute a prisoner in whatever manner it determines. It is said that the military authority have the right to kill when meeting force by force, which is killing without trial, and that such killing cannot be questioned. Why, then, it is asked, should the more humane course of taking a prisoner and killing him after a trial be illegal? I think that on reflection the answer becomes apparent. There are limitations to what can be accomplished by legislation. Once the military are called into action no precise regulations can be laid down prescribing the amount of force to be used; when and when not there should be firing; the exact circumstances in a conflict in which a man should be shot or captured. Reliance must be placed on the humanity of the soldier. But there is no difficulty in the way of legislating that any person not killed in conflict shall be tried according to law. That is exactly what the Act of Parliament has done.

The argument based on military necessity was pressed strongly, and I fully recognize that in a case not touched by special legislation it is not for the civil Court to decide whether a military act was necessary or not. That must be left for the military authority. But I think that it should at least appear that there may have been the necessity. Now, the evidence offered by the military in this case seems to me to negative the necessity for bringing the prisoner before a military Court rather than a Court-martial. General Macready in his affidavit has said in the tenth paragraph that he considered, and considers it absolutely essential, in order to put an end to the terrible murders so frequent and for the suppression of the insurrection, that the local military authorities should not be hampered in their operations. Now, I ask, how could the military authority be hampered in the present case by adopting the procedure of trial by Court-martial which was specially prescribed by the Act? It is not a case in which it was thought necessary that swift justice should be meted out, because the crime and the arrest took place on the 26th May, and the trial was not held till the 11th June. It was quite possible in the time to have had a Court-martial convened. But perhaps it was thought necessary that for the mere offence of being improperly in the possession of arms the death penalty should be imposed notwithstanding the prohibitory provision in the Restoration of Order Act. Perhaps it was necessary to have a salutary example by imposing the death sentence upon the prisoner; but on the case presented by the military authority there was no necessity for a military Court rather than a Court-martial, even for the purpose of getting a death sentence. Every line of the affidavits made by General Macready and Colonel Brind goes to show that the transportation of munition (ninety-seven rounds of revolver ammunition) was an overt act in levying war against the King—high treason—involving the death penalty. Why, then, was the prisoner not prosecuted before a duly constituted Court-martial for that crime? I can find no satisfactory explanation of this. If the example of the death penalty was necessary in the prisoner's case, the Court-martial could have imposed it on a charge properly formulated on the facts which have been deposed to. There is no room for the argument of necessity in the particular case.

I cannot leave this military Court without one further observation. The tribunal of a Court-martial has always been regarded as absolutely fair and impartial. It is composed of honourable and high-minded gentlemen, who are scrupulously careful that any point in the accused's favour should get full weight. I have often heard it said by counsel who appeared at Courts-martial that there was no fairer Court in the world. But, in addition, there are the most precise regulations made under the Army Act to regulate the procedure so that there may be no miscarriage of justice. In particular, the charge against the accused must be precisely formulated. Contrast this with the procedure before this so-called military Court. The charge here is that the accused "was improperly in possession of ammunition." What does this mean? It might mean anything from some desperate criminal purpose down to some technical irregularity. Justice requires that an accused person should know exactly with what he is charged.

Such looseness of procedure, calculated to lead to miscarriage of justice, is exactly what the Legislature had to guard against in the suppression of an insurrection where the loyalist as well as the rebel may find himself the accused party. This is the explanation of the restrictive provisions of the Restoration of Order Act, specially framed so that the King's subjects may have the protection which the Common and the Statute Law affords.

On the ground that the Rostoration of Order Act has limited the powers of the military authority in the present state of war in Ireland, I must hold that the writ of habeas corpus must be issued. It is only after the most anxious consideration that I so decide. I had, on the one hand, to consider the awful conditions which existed at the time of the arrest and conviction, the appalling murders, conflagrations, and other outrages with which the military authority had to cope, and which called for the most drastic action; but, on the other hand, I had to keep well in my mind this first principle of British law: that every subject of the King is at least entitled to be legally tried and legally convicted.

I have not lost sight of the fact that in giving the judgment I do I am acting at variance with the unanimous judgment of the King's Bench Division in *Allen's Case* (1), reaffirmed by subsequent decisions. I hope that my action will not be construed as indicating any disrespect of my colleagues or any overweening opinion of my own. I fully recognize that they have a wide knowledge and experience of criminal law, and that I cannot pretend to any. My practice at the Bar and my life as a Judge of the Chancery Division have left me unqualified for criminal cases; and I say unfeignedly I cannot confidently set up my opinion against the experienced and learned Judges of the King's Bench Division. But, as has been more than once pointed out by the late Lord Chief Baron and by the most eminent English Judges, it is the right of the subject under arrest to apply to any Judge of the High Court for the writ of habeas corpus, and, if the writ is refused, to proceed from Judge to Judge; and that it is the duty of each Judge to form his independent opinion and to act upon it. This does not mean that he is to disregard the opinions of other Judges. It is the duty of the deciding Judge to take such guidance as he can get from other judgments. It only means that he is not absolutely bound by them as in ordinary cases, and that if in his own mind he is unable to follow them he is bound to dissent.

This is my position in the present case. I may have gone grievously wrong. I may be unduly hampering the military authority in their effort to establish peace and order in this distracted country; but I have before me the words of Cockburn C. J. in the *Jamaica Case* (2), which were aptly quoted by Mr. Healy K.C. in *Allen's Case* (1): "There are considerations more important even than shortening the temporary duration of an insurrection. Among them are the eternal and immutable principles of justice, principles which can never be violated without lasting detriment to the true interest and well-being of a civilized community."

(1) [1921] 2 I. R. 244.

(2) [1868] Finlason's Report.

NOTE.

The writ was made returnable for Friday, July 29th, and a similar writ was issued in a second case of *Higgins* v. *Macready and others,* who had been similarly sentenced in Cork. When the Court sat on that day Serjeant Hanna K.C. stated that having regard to the decision of the House of Lords in the case of *The King* v. *Clifford* on the previous day, an appeal lies, and notice of appeal had been served, and the Crown did not propose to produce the prisoners or release them pending the appeal.

O'CONNOR M.R.: I will not listen to any such answer to the writ. The writ must be answered in the ordinary way. Has the writ been obeyed?

Lynch K.C.: No, my Lord.

O'CONNOR M.R.: Then I will order a writ of attachment to issue against the three parties for whom Serjeant Hanna appears. It is a deliberate contempt of Court—a thing unprecedented in this Court and the whole history of British law.

On the following day Serjeant Hanna K.C. stated that the Government had decided to release the prisoners pending the hearing of the appeal; and His Honor, with the consent of Lynch K.C., put a stay on the writ of attachment, and dispensed with any return to the writ of habeas corpus.

Solicitor for the prosecutor: *John B. Lynch.*
Solicitor for the Crown: *The Chief Crown Solicitor.*

R. R.

O'DOHERTY *v.* O'HANRAHAN (1).

Appeal.
1921.
June 21, 28.

Solicitor, Bill of Costs—Taxation—Solicitors' Remuneration Act, 1881 (44 & 45 *Vict. c.* 44)—*General Order*, 1884, *Rule* 2, *Sch. I, Part I—Purchaser's Solicitor—Completion.*

Certain freehold lands were bought in five lots at a public auction by O'D., for whom O'H. acted at the time as solicitor. Subsequently it was arranged with the vendors to substitute F. for O'D. as purchaser of four of the lots. O'H. completed the purchase of one lot for O'D., and H., another solicitor, completed the purchase of the other four lots for F. At the time of the substitution O'H. had only received a copy of the conditions of sale and abstract of title, and submitted them to counsel for his opinion. After the completion of the purchase O'H. claimed from O'D. the scale fee under the Solicitors' Remuneration Act, 1881, on the purchase of the five lots, and also the vendor's scale fee under the same Act on the sale of the four lots to F.

Held (reversing the Master of the Rolls), that a purchaser's solicitor is not entitled to the scale fee unless he has completely or substantially done all the work in connexion with the purchase, including the perusal of the contract or conditions of sale, investigating the title and searches, and preparing, completing, and registering the conveyance; and that O'H. having done these things in reference to one lot only, he was not entitled to the scale fee.

Appeal from an order of the Master of the Rolls dated May 6th, 1921, declaring Mr. John O'Hanrahan, solicitor, entitled to the scale fee on the sum of £6,460, the purchase-money of certain premises purchased at an auction, and referring the bill of costs back to the Taxing Master to review his taxation accordingly.

The facts, as stated by Molony C.J. in his judgment, were as follows:—

On the 23rd January, 1920, certain freehold lands in the town of Omagh were put up for sale by public auction in lots. The plaintiff, Mr. Patrick O'Doherty, attended the said sale and purchased lots 6, 9, 10, 11, and 12 for the sum of £6,460, and instructed the defendant to act as his solicitor in the carrying out of the purchases. There was, apparently, considerable competition for the lots, and after Mr. O'Doherty had been declared the purchaser in trust for himself and brother, negotiations were entered into between him and a Miss Fleming, and an agreement was ultimately entered into on the 21st February, 1920, by which he and his brother agreed to sell lots 9, 10, 11, and 12 in such a manner as would give Messrs. O'Doherty a profit of £1,000 on their contract. The admitted effect of the transaction was to leave the purchase-money applicable to lot 6 at £850.

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(1) Before Molony C.J., and Ronan and O'Connor L.JJ.

It appears from the statement of facts lodged by Mr. O'Hanrahan that an arrangement was then come to with the vendor's solicitor by which he agreed to substitute Miss Fleming for Messrs. O'Doherty in respect of the purchase of lots 9, 10, 11, and 12.

Mr. O'Hanrahan completed the purchase of lot 6 for the plaintiff, and Mr. Holland, solicitor, completed the purchase of the other four lots for Miss Fleming. At the time of the sale to Miss Fleming all that Mr. O'Hanrahan had done was to receive a copy of the conditions of sale and abstract of title, and to submit them to Mr. Murnaghan for his opinion, which he gave, with the necessary requisitions on title, searches, and draft conveyance. The defendant handed a copy of counsel's opinion to Mr. Holland, and the solicitors proceeded to furnish requisitions and complete the purchase on behalf of their respective clients. After the completion of the purchase Mr. O'Hanrahan furnished a bill of costs to Messrs. O'Doherty, in which he claims first the scale fee under the Solicitors' Remuneration Act, 1881, on the purchase of the five lots for £6,460, and, secondly, the vendor's scale fee under the same Act on the resale to Miss Fleming of lots 9, 10, 11, and 12. On the taxation of the costs the Taxing Master allowed the defendant the scale fee on the amount of the purchase-money of lot 6, and he gave the defendant permission to bring in a detailed bill in respect of any work which he had actually done in reference to the other four lots. In his statement of his grounds and reasons the Taxing Master said that there was no evidence or document produced to show that there had been a sale of the four lots to Miss Fleming, nor did Mr. O'Hanrahan act in any capacity on behalf of Miss Fleming, who had a separate solicitor, Mr. R. S. Holland, acting for her in the carrying out of the sale of the remaining lots.

On an appeal to the Master of the Rolls, he made an order declaring Mr. O'Hanrahan entitled to charge the scale fee on the sum of £6,460, the amount of the purchase-money of the five lots. The present appeal was brought from that decision.

Babington K.C. (with him *B. McGuckin*), for the appellant:—

The scale fee, under the Solicitors' Remuneration Act, 1881, is payable only where a solicitor does all the work connected with the sale. Under Order 2 of the General Orders, 1884, the remuneration of a solicitor "in respect of sales, purchases, and mortgages completed" is to be that prescribed in Part I of Schedule I to the Order. Part I of Schedule I gives the scale fee for a purchaser's solicitor for "perusal of contract or conditions of sale, investigating title and searches, and preparing, completing, and registering conveyance." Sub-s. C of Order 2 provides that in respect of uncompleted transactions "the remuneration is to be regulated according to the present system as altered by Schedule II hereto." Under Schedule II such fees are allowed as having regard to the care and labour required and the other circumstances of the case "may be fair and reasonable." Here we are dealing with an uncompleted transaction. "The rules do not authorize the charging the percentage there mentioned, unless the work there mentioned as being the work for which it is chargeable has in substance been done": per Cotton L.J. in *In re Lacy & Son* (1). To entitle a solicitor to the percentage charges under Schedule I, Parts I and II, of the General Orders under the Solicitors' Remuneration Act, 1881, he must have deduced title to the premises, and of this furnishing searches is an essential part: *Ex parte Ferguson & Co. to Buckley* (2). We also rely on *In re Romain* (3), in which *In re Read* (4), relied upon by the other side, is distinguished.

Murnaghan, for the respondent:—

There was an absolute resale of the property in question. This case cannot be distinguished from *In re Read* (4), which was considered with approval by the Court of Appeal in England in *In re Baillie & Co.* (5).

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(1) 25 Ch. D. 301, at p. 309.
(2) 21 L. R. Ir. 392.
(3) [1903] 1 Ch. 702.
(4) [1894] 3 Ch. 238.
(5) 15 T. L. R. 277.

MOLONY C.J., having stated the facts, as set out, proceeded:—

In my opinion the decision of the Master of the Rolls cannot be supported. Under the General Order made in pursuance of the Solicitors' Remuneration Act, 1881, it is necessary, in order to entitle a purchaser's solicitor to the scale fee, that he shall have done everything connected with the purchase of the property, including the perusal of the contract or conditions of sale, investigating title and searches, and preparing, completing, and registering conveyance. It is quite clear that Mr. O'Hanrahan did all these things in reference only to lot 6, and that Mr. Holland performed similar duties in reference to the other four lots. It is quite true that before Mr. Holland appeared upon the scene Mr. O'Hanrahan had sent a case to counsel in reference to all the lots, and a copy of the case and opinion was given to Mr. Holland; but Mr. Holland's client is quite prepared to pay whatever sum may be due in respect of any work utilized by him when a detailed bill is brought in under Schedule II. This, however, was offered by the Taxing Master, and has been refused.

Mr. Murnaghan relies on the case of *In re Read* (1), but an examination of the facts of that case will show that it was essentially different from the present one. The solicitor for the purchaser in that case perused the contract on behalf of his client, and received the abstract of title, and duly investigated it; and after the title had been investigated the purchasers sold part of the lands to a sub-purchaser, and delivered to his solicitor an abstract of title, consisting of the abstract furnished by the vendors, together with a statement of the equitable title of the purchasers. The transaction was carried out by two conveyances, one by the vendors by the direction of the purchasers to the sub-purchaser, and the other by the vendors direct to the purchasers of the remainder. Kekewich J., in these circumstances, held that the solicitor had in substance done the entire work, and he said (page 247):—"The solicitor's contract with the client by which he was bound, if he accepted the retainer, was to do whatever was necessary to attain the completion of the conveyance. He has done whatever was necessary for the completion of the conveyance; he has in substance carried it through to the end. As it happens, his clients have not required him to actually prepare with his own hands the conveyance to the sub-purchaser, because, according to custom, the sub-purchaser prepared his own conveyance; but his clients were parties to the conveyance, and he had to peruse it, and see that it was a proper conveyance by them to the sub-purchaser, not only by the original vendors, but by his own clients; and though in one sense he did not prepare it, I think in substance he did; and so far as he was relieved from doing so, he was only relieved by his clients desiring him to do it in a particular way. I think in substance he has completed it from beginning to end, and I observe that in *In re Lacey & Son* (1) all the Lords Justices intimate that where you see the work is in substance done the remuneration follows."

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(1) [1894] 3 Ch. 238.

In the present case, immediately after the four lots were sold there was a parting of the ways, and Miss Fleming was substituted as purchaser instead of Mr. O'Doherty, and Mr. O'Doherty was not asked to join in the conveyance to her, and had no further responsibility for the lots purchased by her.

The case of *In re Lacey & Son* (1) is an express authority for the proposition that the scale fee is not payable unless all the work, or at least substantially all the work, has been done by the solicitor, and if not the case falls within Schedule II.

The same principle was laid down by Buckley J. in *In re Romain* (2), where he considered both *Lacey's Case* (1) and *Read's Case* (3), and said that in order to earn the scale fee the solicitor must, "if acting for the purchaser, investigate the title, prepare the conveyance, and complete the conveyance; or, if acting for the vendor, he must peruse the conveyance and complete the conveyance." In Ireland the purchaser's solicitor must, in addition, have made requisitions and searches, and see that all acts appearing on the searches were explained: *Ex parte Ferguson* (4).

The order of the Master of the Rolls must, therefore, be discharged, and the ruling of the Taxing Master restored, with costs.

(1) 25 Ch. D. 301.
(2) [1903] 1 Ch. 702.
(3) [1894] 3 Ch. 238.
(4) 21 L. R. Ir. 392.

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RONAN L.J. :—

I am of the same opinion. The material part of the original contract is as follows :—" And they (Messrs. O'Doherty) agree to complete the purchase according to the foregoing conditions." Under the original contract the vendors would be bound to convey to the purchasers or their nominees. If the purchasers completed everything—title, searches, etc.—and then simply directed the vendors to convey four lots to Miss Fleming and the remaining lot to themselves, the case would resemble *Re Read* (1), except that there the resale was of the whole ; here it was only of part. Buckley J. in *Re Romain* (2) thought this sufficient to distinguish the case from *Re Read* (1), but the present case is wholly different.

I take the facts from the affidavit of Mr. Hamilton, the solicitor for the original vendors. [His Lordship read the affidavit, which states the facts above set out.] The conveyance to Miss Fleming creates a contract with her by the original vendors for the four lots at the price of £5,400, and the lands are duly conveyed to her, and the O'Dohertys are not parties to the conveyance, or even mentioned in it. These facts show that the case is wholly different from *Re Read* (1), and that the respondent in no sense did the work specified in the schedule.

O'CONNOR L.J. :—

The terms of the order made in pursuance of the Solicitors' Remuneration Act, 1881, so far as material, read as follows :—" The remuneration of a solicitor in respect of business connected with sales, purchases, leases, mortgages, settlements, and other matters of conveyancing is to be regulated as follows, namely :—(*a*) In respect of sales, purchases, and mortgages completed, the remuneration of the solicitor having the conduct of the business is to be that prescribed in Part I of the schedule to this order, and to be subject to the regulations therein contained" ; and Part I of the schedule reads : " Purchaser's solicitor : for all charges connected with purchase of property, whether by private contract or by public auction, including perusal of contract or conditions of sale, investigating title and searches, and preparing, completing, and registering conveyance." Now, I think this language as plain as plain can be ; and it follows from it that the scale fee prescribed by Part I of the schedule applies, and applies only, when the work and every bit of the work mentioned in it has been, in substance at any rate, performed by the solicitor. This is plain not alone from the language I have quoted, but was specifically laid down by the Court of Appeal in England in *In re Lacey* (1), and applied by Buckley J. in *In re Romain* (2).

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(1) [1894] 3 Ch. 238.

(2) [1903] 1 Ch. 702.

The questions in this case and in every case in which the question is debated are: Has there been a completed purchase? has the solicitor substantially done all the work necessary for that completion—the perusal of the contract, the investigation of the title, the making and checking of the searches, the preparation, completion, and registration of the conveyance?

In this case, as it appears to me, the solicitor, Mr. O'Hanrahan, has certainly not done all of these things, though he has done part of them. He perused the contract, he perused the abstract, and, I presume, the documents vouching it, and then sent a case to counsel to advise on the title, settle requisitions, advise on searches, and draft conveyance. When he had received back the documents from counsel, he sent them on to Miss Fleming's solicitor, Mr. Holland, whom I may term his successor, and from that time on he dropped entirely out of the transaction.

It was Mr. Holland who really did the responsible part of the work, that is to say, forwarded the requisitions, saw that they were complied with, prepared and checked the searches, sent the draft conveyance to the vendor's solicitor and had it engrossed, and executed, and registered. Up to that it was counsel who had really borne the responsibility; but it is the care and attention paid to the furnishing and answers to the requisitions and to the searches and to the registration of the conveyance in due time that the client must trust the safety of his title. It is, in my view, very far-fetched to say that in these circumstances Mr. O'Hanrahan, who escaped most of the responsible work, should be entitled to a scale fee which applies only when the solicitor has done all the work.

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(1) 25 Ch. D. 301.

(2) [1903] 1 Ch. 702.

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The Master of the Rolls seems to have felt himself bound to follow *In re Read* (1). In my opinion that case was wrongly decided, the solicitor being entitled to the following fees, and no more:—1, a scale fee in respect of the contract for £750; 2, a scale fee in respect of the sale of property for £1,800; 3, an itemized bill of costs in respect of the work done towards the completion of the £2,550 transaction before the new contract was entered into. The case, however, is distinguishable from this on the ground that there the question concerned the costs of a solicitor who carried out the purchase and resale, whereas here we have a case wherein the transaction is in part carried out by one solicitor and in part by another.

I am of opinion that the ruling of the Taxing Master was quite right, and that this appeal should be allowed.

Solicitor for the appellant Patrick O'Doherty: *Richard S. Holland.*

Solicitor for the respondent: *John O'Hanrahan.*

C. L.

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(1) [1894] 3 Ch. 238.

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COMPANY—*continued.*
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HARBOUR — Maintenance — Rates — Receiver *over gross income—Application of rates in order prescribed by Act of Parliament* (43 & 44 *Vict. c. lxxxv.*] A body of persons was by statute confirming a provisional order, incorporated, and was empowered to construct and maintain a pier, and to levy rates for the use thereof. The Order directed that the moneys received for rates should be applied for the purpose and in the order following, and not otherwise, namely:—1. In paying the costs of the provisional order. 2. In paying the expenses of the collection and receipt of rates and income. 3. In paying the expenses of the maintenance, repairs, improvement, management,

HARBOUR—*continued.*
and regulation of the harbour and pier, and in the execution and maintenance of such other works, buildings, and conveniences as might be necessary for the improvement of the said harbour, pier, and works. 4. In payment of the interest of any money borrowed. The corporation mortgaged to the plaintiff the said pier, harbour, works, etc., together with the power to demand and recover the rates leviable for the use thereof. In an action by the mortgagees claiming (inter alia) the appointment of a receiver: *Held*, that a receiver should be appointed over the gross amount of the rates, who should, out of the moneys received by him, pay all expenses proper and necessary for the maintenance and working of the defendants' undertaking as provided by the Order, and from time to time lodge his balances to the credit of the action. *Kerry County Council* v. *Tralee and Fenit Pier and Harbour Commissioners*
[Powell J.; App. 71

HOTCH-POT—Destination of appointed portion on death of one of two appointees 213
See Trust in Default of Appointment.

IMPLIED GIFT—None where no gift over and no trust - - - - - 93
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IMPROVEMENTS—Repayment in land stock of advance to Congested Districts Board for purposes of - - - 258
See Land Purchase—Advance.

INCREASE IN INTEREST—Payable on Registered charge—*Increase of Rent and Mortgage Interest (Restrictions) Act*, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-ss.* 2, 4.] The statute 10 & 11 Geo. 5, c. 17, applies only where the relation of landlord and tenant exists. *Held*, therefore, a deed of covenant purporting to increase by two per cent. the amount of interest payable on foot of a charge on registered land did not contravene the provisions of the Act. *Patrick Hegan, a registered owner of land* Ross J. 189

INCUMBRANCE—Payment into Court in respect of incumbrance on sale 178
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INJUNCTION—Libel - - - 173
See Practice.

INSURANCE, POLICY OF—Fire Policy required by Irish Land Commission on sale under Land Purchase Acts—*What interests covered—Subsequent conveyance by purchaser—Rights of grantee with respect to insurance moneys.*] On the resale of his demesne to the owner of an estate under the Irish Land Act, 1903 (3 Edw. 7, c. 37), sect. 3, he, in compliance with the requirements of the Irish Land Commission, effected a policy of insurance against fire on the buildings on the lands by a one-premium policy in the name of the Land Commission covering the entire period of sixty-eight and a half years, during which the land-purchase annuity would be payable. One of the conditions of the policy provided that the insurance company should not require the Land Commission to show at any time that its interest in the property was commensurate with the loss which might have accrued, and the company thereby undertook to make good to the Land Commission such loss irrespective of the interests involved. The owner subsequently conveyed the lands to the plaintiffs. The buildings were destroyed by fire. The Land Commission having been paid the insurance moneys: *Held*, that the plantiffs were entitled to have the moneys applied either for the reinstatement of the premises or towards the redemption of the annuity. The inchoate interest which each successive owner of the lands, having a right to redeem the land-purchase annuity, has in the policy distinguishes the case from those in which successors in title have been held to have no interest in policies effected by their predecessors. *Brady and Others* v. *The Irish Land Commission* - - - M.R. 56

INSURANCE OF TRUST PROPERTY—Premium to be paid out of capital moneys—*Sanction of Court—Jurisdiction.*] On the application of trustees for the purposes of the Settled Land Act, 1882, the Court authorized the payment out of capital moneys of the premium on an insurance against damage or fire arising out of riot or civil commotion of a mansion house, the subject-matter of the trust, situated in a disturbed district. *In re Kinahan's Trusts*; *Hamilton and Bowles* v. *Hudson-Kinahan* - - - Powell J. 210

LANDLOCKED TENEMENT—Way of necessity - - - - 148, 159
See Easement.

LAND PURCHASE—ADVANCE—Congested Districts Board—Expenditure on improvements—*Sale to tenants at enhanced price—Advances for the purpose of the Land Purchase Acts—Repayment in cash or in Land Stock—Irish Land Act*, 1903 (3 *Ed.* 7, *c.* 37), *sect.* 72, *sub-s.* 3—*Irish Land Act*, 1909 (9 *Ed.* 7, *c.* 42), *sect.* 3.] Sect. 72, sub-s. 3, of the Irish Land Act, 1903, provides that where the Congested Districts Board have expended money on the improvement of an estate, and in consequence have sold parcels of that estate at an enhanced

LAND PURCHASE—*continued.*
price to tenants or others, the National Debt Commissioners may advance to the Land Commission, for repayment to the Congested Districts Board, such sums as represent the increase of price consequent on the improvements. Sect. 3, sub-s. 1, of the Irish Land Act, 1909, provides that advances for the purposes of the Land Purchase Acts may be made in whole or in part by means of stock. In this case the owner whose estate was acquired by the Board, and subsequently re-sold by them, was paid the purchase price in Land Stock. *Held* (reversing Powell J.), that the Congested Districts Board were entitled to repayment of the increase of price consequent on improvements only in stock and not in cash. *Congested Districts Board* v. *Attorney-General* - - - - App. 258

1. **LAND PURCHASE ACTS—BONUS—Crucial date**—*Mortgagees in possession—Originating application by—Mortgagees becoming absolute owners pending completion of sale—Irish Land Act*, 1903 (3 *Edw.* 7, *c.* 37), *sect.* 48, *sub-s.* 4.] On the 25th October, 1907, mortgagees in possession lodged an originating application under the Land Purchase Act, 1903 (3 Edw. 7, c. 37), seeking to have the lands of which they were in possession declared fit to be regarded as a separate estate. On the 16th April, 1918, the Land Commission made an order declaring the lands fit to be regarded as a separate estate. In the meantime the mortgagees, under the Statute of Limitations, had become absolute owners. On the 19th June, 1919, the lands were vested in the purchasing tenants, and an order made attaching the claims to the purchase-money. *Held* (Sir James Campbell C. dissentiente), that the crucial date for ascertaining the right to the bonus was the date of the agreement for sale. Per Ronan L.J.: The Act makes the right to the bonus depend on the exercise of the powers of disposition, not on the extent of ownership. The bonus is payable if there is an agreement by a competent vendor and a subsequent vesting order under that agreement. *Huddleston's Estate* (*No.* 2) - - App. 1

2. **LAND PURCHASE ACTS—BONUS—Agreement "entered into"—Verbal agreement for sale** *completed before 24th November*, 1908, *but not reduced to writing and signed till after—Percentage—Scale applicable—Irish Land Act*, 1902 (3 *Edw.* 7, *c.* 37), *s.* 48; *Irish Land Act*, 1909 (9 *Edw.* 7, *c.* 42), *s.* 6—*Statute of Frauds* (7 *Wm.* 3, *c.* 12) (*Ir.*)), *s.* 2.] Prior to 24th November, 1908, oral agreements were concluded between landlord and tenants for the sale to the latter of their holdings, but the agreements were not reduced to writing and signed until after that date. *Held*, that the agreements were "entered into" before the 24th November, 1908, within the meaning of 9 Edw. 7, c. 42, s. 6, and that consequently the full percentage at the rate of twelve per cent. on the purchase-money was payable under 3 Edw. 7, c. 37, s. 48. Such agreements are not within sect. 2 of the Statute of Frauds (7 Wm. 3, c. 12 (Ir.)). *Lord Bellew's Estate* [Ross J. 174

1. **LAND REGISTRY—Devolution of interest**—*Land purchased by Congested Districts Board and resold—Irish Land Act*, 1903 (3 *Ed.* 7, *c.* 37, *Part II*, *ss.* 74-82—*Local Registration of Title* (*Ireland*) *Act*, 1891 (54 & 55 *Vict. c.* 66), *Part IV.*] Land purchased by the Congested Districts Board under the powers conferred on it by Part II of the Irish Land Act, 1903 (3 Ed. 7, c. 37), and resold by them is subject to the provisions of Part IV of the Local Registration of Title (Ireland) Act, 1891 (54 & 55 Vict. c. 66), and consequently on the death intestate of the registered owner becomes vested in his personal representative. *In re Blake* - Ross J. 191

2. **LAND REGISTRY—Devolution of interest**—*Landlord and tenant—Lease for three lives and ninety-nine years, whichever shall continue longest, with a covenant by landlord to nominate new life on death of every cestui que vie dying during the term of ninety-nine years—Non-renewal—Laches—Death of tenant—Purchase under Land Purchase Acts.*] By an indenture of lease, dated the 1st February, 1832, lands were granted to *M.*, his heirs and assigns, for the lives of three persons, and for the term of ninety-nine years, whichever should continue longest, with a covenant by the landlord that, on the death of each cestui que vie dying during the term, the landlord would nominate another life in place of that of the cestui que vie so dying. The cestuis que vie named in the lease died in 1863, 1864, and 1893 respectively, and no new life was ever nominated. The lessee's interest under the lease became vested in *B.M.*, who signed an agreement for the purchase of the lands under the Land Purchase Acts, on the 1st November, 1915, and who died intestate on the 11th February, 1918, the advance of the purchase-money having been sanctioned in January, 1918. The lands were duly registered under the Local Registration of Title Act, 1891 (54 & 55 Vict. c. 66). On appeal from Powell J. ([1920] 1 I. R. 88): *Held*, by Ronan L.J., that the right of renewal had not been lost, and by O'Connor L.J., that such right of renewal had been lost, Sir James Campbell C. not giving a decision upon this question. *Held*, by the Court, that under the Local

LAND REGISTRY—*continued.*
Registration of Title Act, 1891 (54 & 55 Vict. c. 66), sect. 84, on the death of *B.M.* the lands did not vest in the plaintiff as her heir-at-law, but devolved as personalty. *M'Donnell* v. *Stenson* [App. 80

3. LAND REGISTRY—Devolution of interest in land—*Lands registered under the Local Registration of Title (Ireland) Act,* 1891—*Devolution of interest on the death intestate of the registered owner—Local Registration of Title (Ireland) Act,* 1891, *sections* 22, 83, 84, 85.] The estate of the grantor in a fee-farm grant having been sold under the Irish Land Act, 1903 (3 Edw. 7, c. 37), to the grantee *C.* and vested in him, he was, pursuant to the provisions of the Local Registration of Title (Ireland) Act, 1891 (54 & 55 Vict, c. 66), registered as the owner of the lands subject to an annuity of £2 0*s.* 4*d.* payable to the Land Commission. On the death intestate of *C.*: *Held*, that the lands devolved on his personal representative, and that *C.*'s heir-at-law took no beneficial interest therein. *In re Collins, deceased*; *Ferris* v. *Collins* - - - - Powell J. 102

LEASE FOR LIVES—Lives dropped—Fines—Adequate compensation for non-payment of - - - - 114
See Renewable Lease.

LIBEL—Injunction - - - - 173
See Practice.

LUNACY PERCENTAGE—Priority of 182
See Lunacy—Practice.

LUNACY — PRACTICE — *Deceased lunatic's insolvent estate—Payment of costs and lunacy percentage—Priority.*] The Court has jurisdiction to make an order under sects. 51 and 55 of the Lunacy Regulation (Ir.) Act, 1871 (34 & 35 Vict. c. 22), directing costs properly and necessarily incurred in a lunacy matter, and arrears of percentage payable under sect. 109 out of the lunatic's estate, to be paid in full thereout in priority to all other claims. The Lord Chancellor made an order to this effect, the estate of the deceased lunatic being insolvent. *In the Matter of L., a Person of Unsound Mind, deceased* . - L. C. 182

MEMORANDUM OF ASSOCIATION—Alteration in Notice to Creditors of Company—Practice - - - 69
See Company—Memorandum.

MILITARY COURT—State of War—*Habeas Corpus—Prerogative of Crown—Defence of the Realm Consolidation Act,* 1914 (5 *Geo.* 5, *c.* 8)—*Restoration of Order in Ireland Act,* 1920 (10 & 11 *Geo.* 5, *c.* 31—*Court-martial—Disobedience to writ of habeas corpus—Writ of attachment against military authority.*] The prisoner *E.* was arrested and charged with committing an offence "in that he, on the 26th day of May, 1921, near Quin, Co. Clare, in Ireland, was improperly in possession of ammunition, namely, ninety-seven rounds of revolver ammunition and five rounds of service ammunition." On this charge he was brought before a military Court, not a Court-martial, consisting of some military officers, and was convicted and sentenced to death. On an application to make absolute a conditional order for habeas corpus notwithstanding cause shown: *Held*, that a state of war being in existence at the date of the passing of the Restoration of Order in Ireland Act, 1920, the executive powers of the military authorities were limited by that Act, and that accordingly an offence punishable by death could be tried by no other military tribunal than a Court-martial. Conditional order for issue of a writ of habeas corpus made absolute. *Marais's Case* [1902] A. C. 109, distinguished. *R.* v. *Allen* [1921] 2 I. R. 241, not followed. *Egan* v. *General Macready* - - - - - - M. R. 265

MORTGAGEE IN POSSESSION—Becoming absolute owner—Right to bonus - 1
See Land Purchase Acts—Bonus. 1.

PAYMENT INTO COURT, in respect of incumbrance *on sale—Conveyancing Act,* 1881 (44 & 45 *Vict. c.* 41), *s.* 5—*Estoppel.*] Section 5 of the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), provides that where land subject to any incumbrance, whether immediately payable or not, is sold by the Court or out of Court, the Court may, if it thinks fit, on the application of any party to the sale, direct or allow payment into Court, in case of an annual sum charged on the land, or of a capital sum charged on a determinable interest in the land, of such amount as, when invested in Government Securities, the Court considers will be sufficient . . . to meet the incumbrance and any interest thereon. *Held*, that an order of the Court made pursuant to the said section is not a judgment in rem as regards matters not material to the order, and does not estop a vendor who has availed himself of its provisions from saying that, at the date of payment into Court, the incumbrance was statute-barred. *In re M'Swiney and Hartnett's Contract* [Powell J. 178

PERPETUAL RENEWAL—Covenant for, to immediate tenant—Sub-lease of bishop's land - - - - - - 193
See Tithe Rentcharge—Liability for.

POWER OF APPOINTMENT—No gift over in default of appointment—*Implied gift—Vendor and purchaser—Testamentary gift—Rescission by purchaser before summons—Possessory title not forced on purchaser.*] Testatrix made a devise of land, held under a lease for lives renewable for ever, to *A.* for life, with a power of appointment to *A.* among her children, but made no gift to the children, and no gift over in default of appointment. *Held*, there being nothing in the instrument creating the power from which the intention that the objects should take in default of appointment could be gathered, that *A.* took a mere life estate coupled with a power of appointment, and that, there being no trust for the children, there was consequently no gift by implication to them. *Brown* v. *Higgs* (4 Ves. 708), *In re White's Trusts* (Johnson, 656), *Burrough* v. *Philcox* (5 My. & Cr. 73), discussed and distinguished. *Healy* v. *Donnery* (3 I. C. L. R. 213), *In re Weekes' Settlement* ([1897] 1 Ch. 289), discussed and followed. *Clibborn* v. *Horan, and the Vendor and Purchaser Act* - - - - - - - M.R. 93

PRACTICE—Notice to creditors of company of proposed alteration in memorandum advertisements - - - - 69
See COMPANY—MEMORANDUM.

PRACTICE—Service out of jurisdiction—*Injunction—Libel—Jurisdiction—Rules of the Supreme Court (Ireland), 1905, Order 11, r. 1 (g).*] The plaintiff, who claimed an injunction to restrain the defendant company from publishing or exhibiting in Ireland advertisements, placards, books, or circulars containing pictures alleged to be caricatures of the plaintiff, and to be calculated to expose him to ridicule or contempt, obtained leave, by an order made in the Chancery Division under Order 11, rule 1 (*g*), of the Rules of the Supreme Court (Ireland), 1905, to serve the writ out of the jurisdiction upon the defendant company, which had its registered office in London: *Held*, by the Court of Appeal, affirming Powell J. ([1920] 1 I.R. 280), that the discretion conferred by Order 11, rule 1 (*g*), had not been exercised on any wrong principle, and that there was no ground for setting aside the order. *Dunlop* v. *Dunlop Rubber Co., Limited* - - - - - APP. & H.L. 173

PREMIUM ON FIRE INSURANCE of trust property authorized to be paid out of capital - - - - - - 210
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PRIORITY of costs and lunacy percentage 182
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RECEIVER over income of Harbour - 71
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RENEWABLE LEASE — *Lease for lives—Lives dropped—Equitable right to renewal—"Adequate compensation"—Tenantry Act (19 & 20 Geo. 3, c. 30, Ir.).*] The "adequate compensation," on payment of which, under sect. 1 of the Tenantry Act (19 & 20 Geo. 3, c. 30, Ir.), Courts of Equity are empowered to give relief against lapse of time to tenants who have failed to pay renewal fines, is equivalent to full compensation: *Held* accordingly, reversing the decision of Ross J. ([1920] 1 I.R. 257), that it is not competent for the Court, in the exercise of its judicial discretion, to limit the amount of arrears of interest due by a tenant in respect of renewal fines. *M'Dermott's Estate* - - APP. 114

RENEWAL—Right of—Lease for lives—Non-renewal—Laches - - - 80
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REQUISITION as to incumbrance disclosed by root of title offered—Condition of sale precluding inquiry into "prior" title
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RULES AND ORDERS — General Orders, 1884—Rule 2, Sch. 1, pt. 1 - 281
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SCALE FEE—Purchase—Completion - 281
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1. SOLICITOR—BILL OF COSTS—Purchaser's solicitor—Completion—*Taxation—Solicitors' Remuneration Act*, 1881 (44 & 45 *Vict. c.* 44)—*General Order*, 1884, *Rule* 2, *Sch. I, Part I.*] Certain freehold lands were bought in five lots at a public auction by *O'D.*, for whom *O'H.* acted at the time as solicitor. Subsequently it was arranged with the vendors to substitute *F.* for *O'D.* as purchaser of four of the lots. *O'H.* completed the purchase of one lot for *O'D.*, and *H.*, another solicitor, completed the purchase of the other four lots for *F.* At the time of the substitution *O'H.* had only received a copy of the conditions of sale and abstract of title, and submitted them to counsel for his opinion. After the completion of the purchase *O'H.* claimed from *O'D.* the scale fee under the Solicitors' Remuneration Act, 1881, on the purchase of the five lots, and also the vendor's scale fee under the same Act on the sale of the four lots to *F.* *Held* (reversing the Master of the Rolls), that a purchaser's solicitor is not entitled to the scale fee unless he has completely or substantially done all the work in connexion with the purchase, including the perusal of the contract or conditions of sale, investigating the title and searches, and preparing, completing, and registering the conveyance; and that *O'H.* having done these things in reference to one lot only, he was not entitled to the scale fee. *O'Doherty* v. *O'Hanrahan* - - APP. 281

2. SOLICITOR—BILL OF COSTS—Specific contract as to costs—*Deducing title—Scale fee disallowed—Solicitors' Remuneration Act*, 1881 (44 & 45 *Vict. c.* 44)—*General Orders*, 1884, *Schedule* 1, *Part* 1.] In a contract for the sale of real property the purchaser entered into an agreement as follows:—"Assignment to be prepared by my solicitor at my expense, together with all searches and abstracts of title or copies of documents." The vendor's solicitor in furnishing his bill of costs claimed the scale fee, relying on schedule 1 of the General Orders, 1884, under Solicitors' Remuneration Act, 1881. The Taxing Master ruled that the bill was prepared on a wrong principle, and that as the contract was specific the vendor's solicitor was not entitled to the scale fee, and directed an amended bill of costs to be furnished setting forth the charges in detail. *Held*, that the Taxing Master was right. *Alexander to Graham* - - - - - M.R. 186

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—— 50 & 51 Vict. c. 33, s. 14, sub-s. 3 - 138
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—— 54 & 55 Vict. c. 66 - - - 138
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—— 8 Edw. 7, c. 69 - - - - 69
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—— 9 Edw. 7, c. 42, s. 3 - - - 258
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—— 9 Edw. 7, c. 42, s. 6 - - - 174
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—— 5 Geo. 5, c. 8 - - - - 265
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—— 10 & 11 Geo. 5, c. 17 - - - 189
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—— 10 & 11 Geo. 5, c. 31 - - - 265
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SUCCESSOR IN TITLE—Interest of, in fire policy effected on building sold under Land Purchase Acts - - 56
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TIMBER—Removal of timber—"*Use of all roads and passes*"—*Licence to erect saw-mill—Implied rights—Construction of railway—Making gaps in fences—Manufacture of sleepers, etc.—Auctions on the lands—Time for removal of timber.*] Under a contract for the sale by the owner of land of the timber growing on it, with "the use of all roads and passes," and permission to erect saw-mills on the lands, the purchaser was *held* not entitled (*a*) to use a saw-mill erected by him on the lands for the purpose of manufacturing sleepers or brush-heads out of portion of the timber; (*b*) to remove the timber by a mode of traction which so injured the roads through the land as to render them incapable of use by the owner of the land; (*c*) to hold sales of the timber by public auction on the land; (*d*) to leave timber or branches on the land longer than was reasonably necessary. The purchaser under such a contract *held* entitled (*a*) to lay down and work a railway on the land for the purpose of removing the timber; (*b*) to make gaps in walls and fences for the purpose of removing the timber, subject to the duty of restoring the walls and fences. *Rudd* v. *Rea*. POWELL J. [223

TITHE RENTCHARGE, LIABILITY FOR—Estate equivalent to perpetual estate—Sub-lessee of bishop's land—*Toties quoties covenant for renewal—Deed containing any provision, contract, or covenant for perpetual renewal—Perpetuity grant to immediate tenant—Tithe Rentcharge* (*Ireland*) *Act*, 1838 (1 & 2 *Vict*, *c*. 109), *sects*. 7, 8—*Church Temporalities Act*, 1833 (3 & 4 *Wm*. 4, *c*. 37), *sects*. 128, 149, 152, 154.] The immediate tenant of bishop's lands obtained in 1836 a perpetuity grant under the Church Temporalities Act, 1833 (3 & 4 Wm. 4, c. 37). His sub-tenants then, and at the passing of the Tithe Rentcharge (Ireland) Act, 1838 (1 & 2 Vict. c. 109), held from him under leases containing toties quoties covenants for renewal. *Held*, that the sub-tenants had, in 1838, estates or interests held under deeds containing covenants for the perpetual renewal thereof within section 8 of the latter Act, and had accordingly equivalent estates or interests within section 7, and were liable for tithe rentcharge. *Carey Knox's Estate* [Ross J. 193

TRUSTEE — APPOINTMENT — Will appointing no trustees—*Jurisdiction of Court to appoint trustees.*] A testatrix by her will gave certain pecuniary legacies and devised and bequeathed the residue of her property to *A* for life, with remainder to certain named persons. No trustees were appointed by the will. No debts were due by the testatrix at the date of her death. The executor, having paid all funeral and testamentary expenses, held certain shares, representing the residue of the estate. On an application by the tenant for life and the remaindermen for the appointment of trustees of the will: *Held*, that the Court had jurisdiction to appoint trustees. *Pollock* v. *Ennis* - - - POWELL J. 181

TRUST IN DEFAULT OF APPOINTMENT—*Hotch-pot*—"*Will*"—*Express reference to will* (*subsequently revoked*) *of another person—Power to charge portions for younger children—Charge by will in favour of son who predeceased testator—Lapse—Destination of lapsed portion.*] A testatrix left the residue of her property to trustees on trust to pay the income to her daughter until the latter should "actually acquire a vested interest in possession, and a present right to receive the several legacies and benefits bequeathed and limited to her" under her father's "will." The testatrix having predeceased her husband, the latter revoked the "will" referred to in his wife's will. *Held* that, under her mother's will, the daughter became entitled to the residue absolutely. *S. B.* by his will put certain lands in settlement, and empowered the tenant for life, *J. H. B.*, to charge thereon portions, not exceeding £2,000 in all, for younger children. In exercise of this power, *J. H. B.* by will charged £2,000 on the settled lands, and appointed this sum in favour of his two sons, *R. B.* and *W. B.* equally. *Held* that, on the death of *R. B.* in his father's lifetime, the sum of £1,000 appointed in his favour sank into the inheritance. By a settlement made on the marriage of *J. H. B.* and *H. I. O.*, *J. H. B.* settled a policy of assurance on his life for £6,000 (represented on his death by policies for £6,085) in trust after his death for his younger children in such shares as the settlor should appoint, with the usual trust in default of appointment equally, and hotch-pot clause. The settlor by his will appointed £500 in favour of *R. B.*, £500 in favour of *W. B.*, and the residue in favour of *I. M. B.* *R. B.* having predeceased his father: *Held*, that the testator was dealing with a definite and ascertained sum, and that consequently the share appointed to *R. B.* did not fall into the residue, but passed as in default of appointment and by the operation of the hotch-pot clause to the personal representative of *R. B.* *Bagge* v. *Bagge* - - - - Ross J. 213

VENDOR AND PURCHASER—CONDITION OF SALE—Condition of Sale precluding purchaser from inquiry as to equities—*Sale of Land purchased under Land Purchase Acts, registered under Local Registration of Title (Ireland) Act,* 1891—*Unreasonable condition—Purchase of Land (Ireland) Act,* 1885 (48 & 49 *Vict. c.* 73), *s.* 8—*Land Law (Ireland) Act,* 1887 (50 & 51 *Vict. c.* 33), *s.* 14, *sub-s.* 3.] A tenant who had purchased her holding under the Irish Land Purchase Acts was registered as owner in fee-simple under the Local Registration of Title (Ireland) Act, 1891 (54 & 55 Vict. c. 66), subject to the rights or equities (if any) arising from the interest thus acquired being deemed to be a graft on her previous interest. On a sale of the lands the conditions of sale provided that the vendor should be deemed to have a good and sufficient title and power to assign the premises, and precluded any requisition as to evidence of title other than a copy of the folio. The conditions further provided that the title of the vendor prior to the date of registration should not be investigated. *Held,* that the conditions of sale were confused, contradictory, and misleading, and that the purchaser was entitled to be relieved from his contract. When the root of title itself embodies a restriction or incumbrance—not by mere recital, but in its operative part—a requisition that the restriction or incumbrance shall be shown not to affect the lands is not in itself an inquiry into the prior title, but into the title derived from the root put forward. *White and Hayue's Contract* - - - M.R. 138

VENDOR AND PURCHASER—Possessory title not forced on purchaser - 93
See Power of Appointment.

WAY OF NECESSITY—Landlocked tenement - - - - 148, 159
See Easement.

WILL—ESTATE IN REALTY—*Devise to J., "with remainder to her and her children for ever"—"Children" a word of limitation.*] A testatrix devised real estate to her son *T.* during his natural life, and, in case of no lawful issue by him, to her daughter *J.*, "with remainder to her and her children for ever." At the date of the will and of the testator's death there were seven children of *J.* living. *T.* died unmarried, and *J.* died intestate. *Held* (affirming the Master of the Rolls, Ronan L.J. dissenting), that the word "children" as used in the will was a word of limitation, and that *J.* took an estate tail general. *Ward* v. *Ward* - - - - App. 117

"WILL"—Reference to revoked will of another.
See Trust in Default of Appointment.

WORDS—"Adequate compensation."
See Renewable Lease.

—— "Entered into" Agreement, - 174
See Land Purchase Act—Bonus. 2.

—— "Use of all roads and passes" - 223
See Timber.

THE END.

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